UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JOHNSON CONTROLS, INC.,	)	
Employer,	)	
	)	
and	)	**Case No. 16-RC-256972**
	)	
SMART-SOUTHWEST GULF COAST REGIONAL COUNCIL,	)	
	)	
	)	
Petitioner.	)	

JOHNSON CONTROL INC.'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION, EMERGENCY MOTION TO STAY MAIL BALLOT ELECTION, AND MOTION TO PROCEED WITH MANUAL ELECTION

This matter was already before the National Labor Relations Board ("the Board") on three (3) Requests for Review including Johnson Controls, Inc.'s ("the Company's") April 29, 2020, *Request for Review of Regional Director's Amended Order* (challenging the breach of the Stipulated Election Agreement and imposition of a mail ballot procedure), its April 29, 2020, *Request for Review of Regional Director's Denial of Joint Motion* (challenging denial of Company and Union's joint request to proceed with a manual election per the parties' agreement), and the Company's May 1, 2020, *Request for Review of Regional Director's Order* (challenging the propriety of the telephonic representation hearing convened on Monday, May 4, 2020). In the interest of brevity, the Company incorporates by reference those filings into this document. (*See* Attachment A). On May 8, 2020, the Board issued an Order denying those filings but noted, "The Employer retains the right to renew its contentions in connection with any requested review of any subsequent action taken in this case."

Pursuant to Section 102.67 of the Board's Rules and Regulations, the Company requests review of Region 16's Decision and Direction of Election ("DDE") dated May 7, 2020. (*See* Attachment B). The following compelling reasons require that the Board grant this *Request*:

- The DDE raises a substantial question of law and/or policy because it applies inappropriate standards in an effort to evade the Board's preference (and, the Parties' preference) for manual election, which obviously would best protect the franchise of approximately 150 voters working uninterrupted at the Company's facility in a geographic area not substantially impacted by COVID-19 issues. *See, e.g*., Case Handling Manual ("CHM"), Section 11301.2 (mixed or mail balloting only exists where necessary to "enhance the opportunity of all to vote"); *San Diego Gas & Light*, 325 NLRB 1143, 1145 (1998) (mail ballot elections are only appropriate where "one might reasonably conclude that their [the employees'] opportunity to participate in the election ***would be maximized***") (emphasis added).

- The DDE raises a substantial question of law or policy because it constitutes an unjustified breach of the Parties' Stipulated Election Agreement. *See T&L Leasing*, 318 NLRB 324, 326 (1995) (the regional director is bound by terms of a stipulated election agreement for a manual election "in the absence of unusual circumstances making the agreement ***impossible*** to perform.") (emphasis added).

- The DDE raises a substantial question of law or policy because of the apparent absence of officially reported Board precedent to support the Regional Director's largely unexplained and unjustified action. In revoking the Parties' Stipulated Election Agreement to conduct a manual election and issuing a DDE for a mail ballot election, the Regional Director relies solely on a generalized concern relating to the mere existence of COVID-19, without adequate consideration of specific factors relevant to the case at hand, including:

- The indisputable lack of any known presence of COVID-19 at the Facility;
- The substantial and effective safety protocols in place at the Facility;
- The relatively low impact of COVID-19 on the relevant municipality (San Antonio);
- The impending "re-opening" of the State in question (Texas); and/or
- The political nature and detrimental/coercive effect of the Regional Director's decision on a group of essential employees who have been working uninterrupted at a facility the Regional Director now expressly deems inherently unsafe to vote in.

- A substantial question of law or policy is raised because the representation hearing underlying the DDE did not comport with the Board's rules and regulations and violated procedural due process standards. *See, e.g.*, Board's Orders in *Morrison Healthcare*, 12-RC-257857 and *BASF*, 07-RC-259428. (*See* Attachment C.)

- A substantial question of law or policy is raised because the DDE violates the CHM by: (1) failing to identify a place for the ballot count; (2) failing to ensure, contrary to both the Union's and the Company's clear positions at hearing, that even the Parties' legal representatives will be permitted to attend the ballot count; and (3) contemplating a remote ballot count not permitted under the Board's rules and regulations. *See* DDE ("The mail ballots will be counted on June 16, 2020 at 2:00 p.m. at a location to be determined, either in person or otherwise, after consultation with the Parties, provided the count can be safely conducted on that date."); CHM, 11340.1, 11340.2.

- The DDE raises a substantial question of law or policy because it does not relate to the same facts as the Board's recent Order in *Atlas Pacific Engineering Company*, 27-RC-258742 (May 8, 2020) (mail ballot warranted based on "extraordinary federal, state and local directives that have limited nonessential travel, required the closure of non-essential businesses, and resulted

in a determination that the regional office charged with conducting this election should remain on mandatory telework."). The relevant, local order for the situs of the Company's workplace is Bexar County, Texas. The restrictions contained in that Order lift on 12:01 a.m. on May 19, 2020—***less than eight (8) hours after the mailing time proposed by the DDE***. Compare DDE, Notice of Election, Method and Date of Election (proposing mailing of ballots at 4:45 p.m. on Monday, May 18, 2020) with Bexar County Order (https://bexar.org/Document Center/View/26838)(restrictions lift at 12:01 a.m. on Tuesday, May 19, 2020). A difference of less than a half-day between the proposed mailing time and the lifting of COVID-19 related restrictions should not serve as a basis for ignoring the Board's longstanding preferences for a manual election.

- A substantial question of law or policy exists because the DDE is making a political statement contrary to the Board's neutrality. Specifically, that the employees are working in an environment that is unsafe and simply "too dangerous" for Board personnel. In addition, the Company respectfully submits that maximizing employee participation in a Board supervised manual election should not be deemed a "nonessential function."

- A substantial question of law or policy exists because the DDE erroneously claims "there are no means for enforcing social distancing." DDE, p. 5. This conclusory statement completely ignores the Company's strict enforcement of social distancing as a workplace rule, and is wholly unsupported by the record.

- A substantial question of law or policy exists because the DDE is internally inconsistent. On the one hand, the DDE relies upon "touching a ballot" as a danger and, yet, purports to order the Company to post a Notice of Election. Under the DDE's reasoning, no Notice of Election can be posted if the Board deems the touching of paper an inherent risk. DDE, p. 5, 12; *see also* CHM 11314.2.

- A substantial question of law or policy is raised because the Board should not be overruling the judgments of local authorities as to matters surrounding reopening. The site (San Antonio, Texas) will be substantially open only one day after the DDE's proposed ballot mailing. A manual election can be held in full compliance with state and local guidelines as early as Thursday, May 21, 2020. Further, a ballot count can be conducted on that very same day rather than the prolonged, potentially open-ended process contemplated by the DDE (again, the DDE cannot even promise votes will be promptly counted under its procedures).

Texas is among the states spearheading the reopening of the American economy. More specifically, Texas is relaxing some of the previously imposed restrictions on travel, including reopening nonessential businesses. Indeed, on May 5, 2020, Texas Governor Gregg Abbott issued an order **opening** the following businesses effective Friday, May 82020:

- Salons and personal care services with social distancing
- Tanning salons with social distancing
- Swimming pools with occupancy limits

Further, and consistent with moving to relax the predating restrictions, the following businesses may open on **May 18, 2020**:

- Services provided by office workers in offices that operate at up to the greater of (i) five individuals, or (ii) 25 percent of the total office workforce; provided, however, that the individuals maintain appropriate social distancing.
- Manufacturing services, for facilities that operate at up to 25 percent of the total listed occupancy of the facility.
- Gyms and exercise facilities and classes that operate at up to 25 percent of the total listed occupancy of the gym or exercise facility; provided, however, that locker rooms and shower facilities must remain closed, but restrooms may open.

For Texas counties that have filed with the Texas Department of State Health Services ("DSHS"), and are in compliance with, the requisite attestation form promulgated by DSHS

regarding five or fewer cases of COVID-19, those in-store retail services, dine-in restaurant services, movie theaters, shopping malls, museums and libraries, indoor wedding venues, wedding reception services, swimming pools, services provided by office workers in offices of more than five individuals, manufacturing services, and gyms and exercise facilities and classes, as otherwise defined and limited above, may operate at **up to 50 percent** (as opposed to 25 percent).

With respect to Bexar County, where the present election is slated to take place, highest-ranking local authority County Judge Nelson W. Wolff, issued Bexar County Executive Order NW-07 on April 29, 2020. County Judge Wolff's Order specifically states it seeks to "remain as consistent with and to harmonize . . . [with] the executive orders of Governor Greg Abbott . . . ." In that spirit, County Judge Wolff's Order reopens services in Bexar County, including:

- Retail services
- In-store retail services
- Dine-in restaurant services
- Movie theaters
- Shopping malls
- Bexar County museums and Bexar County libraries (once authorized by specific approval)
- Golf courses
- And, "[s]uch additional services as may be enumerated by future executive orders or proclamations by Texas Governor Greg Abbott." See County Judge Wolff's April 29, 2020, Order; *see also* Mayor of the City of San Antonio Ron Nirenberg's April 29, 2020, Declaration.

The Company is aware of the Board's decision in *Atlas Pacific Engineering Company*, NLRB Case No. 27-RC-258742, Decision and Direction of Election issued May 8, 2020. The Company presents that the facts that apply to the current election in Bexar County implicate facts

critically different from those decided in *Atlas Pacific*. More specifically, on or around April 20, 2020, when NLRB Region 27's Regional Director determined a mail ballot election would be held in that case, the following facts applied there – which are distinguishable from ours:

- Colorado Governor Jared Polis' April 6, 2020, Executive Order applied in Pueblo, County at that time. That order included a stay-at-home mandate, limited nonessential travel and required the closure of nonessential businesses – in stark contrast with current conditions in Texas.

- In addition, the current numbers of confirmed cases and deaths related to COVID-19 are wildly different:

  - Colorado has 942 fatalities with a population of 5.759M people;

  - Texas has 1,016 fatalities with a population of 29M people.

  - Stated differently, Texas fatalities are almost the same as Colorado with six times more people.

  - *See* https://www.statista.com/statistics/1103688/coronavirus-covid19-deaths-us-by-state/

Based upon the facts in the location in question, the extraordinary circumstances referenced in *Atlas Pacific* do not exist and should not be applied with a broad brush in San Antonio.

If the residents of San Antonio, Texas (including the Company's personnel, resident Board agents and the general population) can attend a movie, shop in a mall and dine-in restaurant, then surely an issue concerning representation can be resolved consistent with Board precedent favoring manual elections. If the Board fails to recognize the significant differences between the site at issue in *Atlas* and the facts of this case, one simply cannot imagine a return to the favored method of manual elections for the foreseeable future. A generalized "concern" by the Board should not trump a locality's informed judgment (no doubt backed up by medical professionals) as to the level of safety related to activities despite the presence of COVID-19. The Company's facility is safe, its employees are safe, the Union and Company agree that a manual election can be safe (far safer

than movie theaters or grocery stores) and local authorities deem some level of normal, "nonessential" activity safe with proper safeguards. Given these facts, the DDE cannot and should not stand.

For all of these reasons, the Company respectfully requests that the Board grant this *Request For Review of Regional Director's Decision and Direction of Election, Emergency Motion to Stay Mail Ballot Election, and Motion to Proceed with Manual Election*,[1] vacate the DDE.

Dated this 8th day of May 2020.

Respectfully submitted,

/s/ Jeremy Moritz

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[1] The Company requests that the Board issue a manual ballot election, and for the election to be scheduled on a Thursday to ensure the highest work attendance turnout.

ATTACHMENT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JOHNSON CONTROLS, INC.,

Employer,

and **Case No. 16-RC-256972**

SMART- SOUTHWEST GULF COAST REGIONAL COUNCIL,

Petitioner.

JOHNSON CONTROLS, INC.'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S AMENDED ORDER

Respectfully submitted,

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Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, Johnson Controls, Inc. (the "Company") requests review of the Regional Director for Region 16's *Amended Order Revoking Stipulated Election Agreement and Notice Rescheduling Representation Hearing* dated April 23, 2020 ("*Amended Order*") in the above-captioned matter. The following compelling reasons require the National Labor Relations Board ("NLRB" or "Board") to grant this Request:

- A substantial question of law or policy is raised because the *Amended Order* presents a departure from officially reported Board precedent. *See T&L Leasing*, 318 NLRB 324, 326 (1995) (Regional director is bound by the terms of a stipulated election agreement for a manual election "in the absence of unusual circumstances making the agreement ***impossible*** to perform." [Emphasis added.]);
- A substantial question of law or policy is raised because of the apparent absence of officially reported Board precedent to support the Regional Director's largely unexplained and unjustified action. In revoking the parties' agreement to conduct a manual election, the Regional Director relies solely on a generalized concern relating to the mere existence of COVID-19 in the world, without any consideration of specific factors relevant to the case at hand, including:
  - The indisputable lack of any known presence of the virus at the facility at issue;
  - The substantial and effective safety protocols in place at the facility;
  - The relatively low impact of COVID-19 on the relevant municipality (San Antonio);
  - The "re-opening" of the state in question (Texas); and/or

  - The political nature and detrimental/coercive effect of the Regional Director's actions on a group of essential employees who have been working uninterrupted at a facility the Regional Director now indicates is unsafe to vote in.

- To the extent the *Amended Order* rests on valid interpretations of existing Board precedent, there are compelling reasons for reconsideration with respect to important Board rules and policy.

Concerns about COVID-19 are understandable. The filing is not intended to be, nor is it, a gratuitous or unnecessary critique of the National Labor Relations Board ("the Board" or "NLRB") or its personnel in navigating these challenges. That said, however, the Board has clearly lost its way with respect to pending representation proceedings generally, and the above-captioned matter specifically.

As this brief will demonstrate, under relevant Board precedent the Regional Director has abused his discretion by revoking his approval of the parties' stipulated agreement for a manual election. ***If any set of facts could ever justify a finding that a manual election is proper and not "impossible" in the current environment, they exist in this matter***. Substantial and effective safety protocols are and have been in effect at the facility in question. No case (or even suspected/rumored) case of COVID-19 exists within the relevant workplace. The facility at issue sits in a geographic location relatively unimpacted by COVID-19 and in a State set to substantially "re-open" by the election date proposed by both the Company and the Union. The facility and the voting area are substantial in size, well-ventilated, and have many access points to outdoor areas. The parties concur that a manual election is appropriate and wish to abide by the terms of their contract.

Therefore, the Regional Director's *Amended Order* represents an erroneous and unjustified departure from applicable NLRB law that denies the parties their rights under the Agreement and relevant legal precedent.

I. STATEMENT OF THE CASE

On February 26, 2020, SMART-Southwest Gulf Coast Regional Council ("Union" or "Petitioner") filed a representation petition involving a Company facility located in an industrial and agricultural (as opposed to residential) area on the outskirts of San Antonio, Texas. Following prolonged and detailed negotiations, Region 16 approved a March 4, 2020 Stipulated Election Agreement ("Agreement") for a manual election. At that time, COVID-19's presence was fully known and well-publicized.[1]

On March 17, 2020, the Board postponed representation elections due to general public health and safety concerns. On April 1, 2020, the Board announced it would resume conducting representation elections insofar as health/safety concerns allow and in accordance with Board precedent.

On April 9, 2020, the Regional Director for Region 16 issued an *Order to Show Cause* seeking the parties' positions with respect to whether the Agreement should be revoked and a mail ballot election held instead of the agreed-upon manual election. (*See* Attachment 1.) The Union responded with a one-sentence request for mail ballot, without stating any basis for its request.[2] (*See* Attachment 2.) The Company filed an April 16, 2020 *Employer's Response to Order to Show Cause* setting forth its legal positions and relevant supporting facts, including the

[1] *See, e.g.,* Active Monitoring of Persons Exposed to Patients with Confirmed COVID-19 – United States, January-February 2020 (Mar. 3, 2020 early release), available at https://www.cdc.gov/mmwr/volumes/69/wr/mm6909e1.htm?s_cid=mm69091_w.

[2] As explained herein, the Union later revised that position to seek adherence to the original stipulated election agreement's provision for a manual election.

substantial safety procedures that would surround a manual election at the facility. (*See* Attachment 3.)

On April 23, 2020, the Regional Director issued his *Amended Order Revoking Stipulated Election Agreement and Notice Rescheduling Representation Hearing*.[3] The entirety of the Regional Director's rationale for the *Amended Order* is stated as follows:

> Having considered the parties' positions, I find that, under the current circumstances involving the Covid-19 pandemic, I must revoke my approval of the March 4 Stipulated Election Agreement in order to ensure the safety of all parties, Board personnel, voting employees and the general public.

(*See* Attachment 4, p 1.) The *Amended Order* offers ***no explanation whatsoever*** as to how or why the existing and proposed additional safeguards at the Company's facility would be insufficient "to ensure the safety of all parties, Board personnel, voting employees and the general public." The *Amended Order* only refers generally to existence of "the Covid-19 pandemic," and cites no specific facts relating to the actual election location—including the facility itself, the surrounding municipality (San Antonio) or even the status of the relevant State (Texas). Put simply, the *Amended Order* relies on nothing more than an unsubstantiated "general concern" related to the virus.

On Friday, April 24, 2020, the Union and the Company filed a *Joint Motion to Proceed with Manual Election* ("*Joint Motion*"). The *Joint Motion* set forth the parties' shared belief that "the safety and other assurances contained in the Employer's *Response to Order to Show Cause* are ***sufficient to permit a manual election to go forward***." (*See* Attachment 5, p. 1. [Emphasis added.])

[3] The *Amended Order* sets a hearing for ***Friday, May 1, 2020.*** However, the Amended Order also stated that "hearing details will be provided to the parties by April 28, 2020." ***No such hearing instructions have issued and***, therefore, the Company as of this writing cannot serve subpoenas related to the hearing. In short, it remains an open question as to whether the Region will actually pull off a May 1st hearing.

On Tuesday, April 28, 2020, the Regional Director issued an *Order Denying Joint Motion to Proceed with Manual Election,* which in its entirety states, "After consideration, the *Motion* is hereby denied." The Regional Director's *Order Denying Joint Motion to Proceed with Manual Election* is the subject of a separate *Request for Review* filed simultaneously with this document.[4]

II. ISSUES

The principal issue in dispute is whether the Regional Director abused his discretion by revoking the Agreement for a manual election on the sole basis that COVID-19 exists in the world.

First, the Regional Director's ultimate conclusion that the Agreement should be revoked "to ensure the safety of all parties, Board personnel, voting employees, and the general public" is factually and legally erroneous and contrary to NLRB precedent.

Second, it was an error for the Regional Director to exercise his discretion to revoke the Agreement based on nothing more than a vague reference to "the current circumstances involving the COVID-19 pandemic."

Accordingly, the NLRB should grant review, vacate the *Amended Order*, and order the Region to conduct a manual election pursuant to the parties' Agreement.

III. RELEVANT BACKGROUND INFORMATION

The relevant facility produces industrial chillers at 5680 FM 1346, San Antonio, Texas

[4] The Company is familiar with the Board's "ripeness" and other procedural requirements. In this case, the *Amended Order* revoking the Stipulated Election Agreement could not have been issued absent an implicit finding that a mail ballot election should be held instead of the agreed-upon manual ballot. The Regional Director's summary denial of the parties' *Joint Motion* similarly evidences his intransigent posture. Finally, the same Regional Director authored the *Decision and Direction of Election* in *Victory Wine Group* (16-RC-257874), discussed *infra*. While *Victory Wine* involves significantly different facts than this matter (no existing stipulated election agreement, voting location in an area more impacted by COVID-19, etc.), the Company respectfully submits that the "writing is on the wall" concerning the Regional Director's ultimate position in this case. The Company and the Union should not be subjected to a representation hearing where the outcome is already (and, incorrectly) predetermined.

78220. Industrial chillers are essential to a variety of buildings, including those housing health care personnel and equipment. At all times, the facility operates in a safe manner. At all material times, the facility's workforce and operations have remained uninterrupted by any COVID-19 issue.

As explained in the Company's *Response to Order to Show Cause*, the facility has continued its operations as an employer performing an "essential" function under the definitions established by the Governor of Texas, Bexar County Judge Nelson W. Wolff and any and all other relevant federal, state and local authorities. The plant functions in full accordance with ***and in excess of*** all Center for Disease Control ("CDC") guidelines. All of the following precautions (and others) have been in place at the facility due to the current circumstances:

* Increased employee-wide communications regarding health/safety protocols;
* Additional cleaning resources and enhanced cleaning schedule to ensure sanitation;
* Additional cleaning supplies and sanitizers across the facility;
* Time clocks repeatedly treated with antiviral spray;
* Staggered and revised break and lunch periods to maintain social distancing;
* Seating areas revised to maintain social distancing;
* Physical markings on floors to maintain proper social distancing;
* Open doors to ensure additional ventilation and sunlight;
* Limitations on outside smoking areas and required social distancing;
* Mandatory adherence to handwashing protocols with antibacterial gel backup;
* Provision and mandatory use of face masks;
* Increased frequency of Local Emergency Management Team sessions;
* Non-essential employees (*not eligible voters*) work from home where appropriate; and
* IR thermometers on site for screening; 100% scanning in place; no one permitted to leave vehicle until scan successfully passed.

Consistent with these mitigation efforts, the Company's San Antonio facility has ***no reported, confirmed or even rumored cases of COVID-19 infection or work-related exposure***. Put simply, the facility and its personnel practice the Company's highest safety protocols to ensure safety and well-being.

IV. THE REGIONAL DIRECTOR'S FINDINGS

Without discussion of any specific factors upon which his *Amended Order* was based, the Regional Director revoked the parties' stipulated election agreement. In reaching a determination that revocation of the Agreement was necessary based on broadly-stated "safety" concerns relating to a manual election, the Regional Director failed to address any of the numerous relevant points raised in the Company's *Response to Order to Show Cause*—or the fact that even the Union did not cite any safety concerns in requesting a mail ballot election in response to the Order to Show Cause.

V. APPLICABLE LEGAL STANDARDS AND ANALYSIS

A. The Regional Director Erred in Revoking the Stipulated Election Agreement.

Election agreements are "contracts" binding upon the parties that executed them. *See, e.g., Barceloneta Shoe Corp*., 171 NLRB 1333, 1343 (1968). For this reason, the Board has held a regional director may not revoke or materially breach an agreement for a manual election in the absence of unusual circumstances making the agreement "***impossible***" to perform. *T&L Leasing*, 318 NLRB 324, 326 (1995) ("We believe that the date of an election and the type of election (manual or mail) are both very important elements of the election process. It is not unusual for parties to negotiate long and hard for their respective positions on these issues. Where, as here, they have reached agreement on these issues, that agreement cannot be cast aside, absent unusual circumstances which make the agreement impossible to perform."); *see also id*. at fn. 12 ("[W]e find that this 'impossibility of performance' standard is implicit from Board and court cases holding that where there is an approved stipulation, neither the parties nor the Board may breach its material terms.") The current COVID-19 circumstances are unusual, but the Regional

Director cannot and has not established that the agreed-upon manual election is "impossible to perform," as the Board requires. *See ibid*. Nor has he even attempted to do so.

Significantly, the Regional Director's actions (and those of his counterparts, as discussed below) are completely rewriting Board precedent, producing pages upon pages of creative "analysis" that mischaracterizes and misapplies the holding of *San Diego Gas & Electric*, 325 NLRB 1143 (1998) and the significance of revisions to the NLRB's *Casehandling Manual Part Two: Representation Proceedings* ("*Casehandling Manual*"), section 11301.2 ("Manual or Mail Ballot Election: Determination").

As a threshold matter, the trending "analysis" does not control here where a stipulated election agreement exists and both parties have clearly expressed their desire to abide by its terms. Regardless, the current "in fashion" reasoning flows as follows:

1) *San Diego Gas* states that mail ballot should be taken into consideration in "***at least***" three situations (scattered voters, scattered schedules, strike/lockout). "At least" must mean that other possible situations exist where mail ballots may be used, such as the current COVID-19 environment.
2) Following *San Diego Gas*, the *Casehandling Manual* was revised to remove the standard that mail ballots should only be held where manual ballots were "infeasible," in favor of a more "flexible standard than has sometimes been inferred" from the "infeasibility standard." *See, e.g., San Diego Gas* at 1145, n. 6; *Casehandling Manual*, section 11301.2; *see also Victory Wine Group, LLC, Decision and Direction of Election*, 16-RC-257874 (Reg'l Dir. Apr. 23, 2020) ("*Victory Wine*") at pp. 5-7 (arguing, essentially, that the presence of COVID-19 as a general matter and *ipso facto* creates an "extraordinary

circumstance" where mail ballot may be ordered regardless of the specific facts of the case and despite all Board standards to the contrary).

3) Therefore, magically, the existence of COVID-19 permits a regional director to dispense with manual elections altogether based on nothing more than the mere existence of the virus and without any reasoned assessment of the actual election environment at issue in a particular case.

This entire brand of analysis bastardizes and misapplies Board precedent, turning what should be a fact-specific exercise of a regional director's reasoned discretion into an exercise in utter futility by the parties. Regional directors are throwing facts and law to the wind in order to reach a desired conclusion based on imagined hypotheticals that have no bearing on issues that are properly within the functions of the Board to consider, such as employee free choice of representative, maximum voter participation, supervision of selection of representative, and yes, voter safety ***at a particular location based on actual facts relevant to that location***. *See, e.g., Victory Wine*, p. 4 (opining that, while the Board has personnel "who would appear to be infection free," the virus may be spread by an asymptomatic individual and suggesting that no manual election will be held until "testing is more widespread"); and *Victory Wine*, p. 7 (relying on a "***worldwide pandemic*** in which more than 185,000 deaths have occurred" instead of limiting the analysis to Board's jurisdiction (the United States) or the election site (Texas)); *compare Victory Wine* at p. 4 (speculating without any evidentiary basis whatsoever that a Board agent may be travelling from a more infected area) *with San Diego Gas* at p. 1145, n. 8 (internal Board concerns are only properly considered where other prerequisites to mail ballot are present). ***None of the speculative, unproven, irrelevant and hypothetical scenarios just cited are properly the Board's concern under current NLRB precedent***.

Instead, all Board precedent is designed based upon a threshold consideration; specifically, what method of election best advances employee choice (*i.e.*, voter turnout, ease of participation, *etc*.). Mail or mixed ballot voting ***only exists*** when necessary to "***enhance the opportunity of all to vote***." *Casehandling Manual*, Section 11301.2. *San Diego Gas* includes the very same admonition: "Extraordinary circumstances," standing alone, do not create an entitlement to or preference for mail ballot procedures. Instead, those circumstances must be addressed in a fashion where one "***might reasonably conclude that their [the employees'] opportunity to participate in the election WOULD BE MAXIMIZED by utilizing mail or mixed ballot election methods***." *Id*. at 1145. (Emphasis added).

For the very same reason, the contorted analysis currently employed by regional directors involves a common error. Current regional decisions rely heavily on two footnotes (6 and 10) of *San Diego Gas* to advance a theory of unfettered regional director discretion in the age of COVID-19. *See, e.g.*, *Victory Wine* at p. 7 ("The Board rejected limitations implied by outdated language in the Casehandling Manual that suggested mail ballot elections were proper only if manual ballot elections were infeasible, as well as suggestions that a mail ballot election should never be held where it would be possible to conduct an election manually") citing *San Diego Gas*, 325 NLRB at 1145, fn. 6, 10.

This analysis conveniently ignores an important caveat contained in *San Diego Gas.* Specifically, a regional director's exercise of discretion—***even in cases of extraordinary circumstances***—must be tied to the Board's proper role in ensuring employee participation and free choice. *Id*. at n. 10 ("A Regional Director should, and does, have discretion, utilizing the criteria we have outlined, to determine if a mail ballot election would be both more efficient ***and***

likely to enhance the opportunities for the maximum number of employees to vote." [Emphasis added.]).

In this matter, the approximately 150 eligible voters all are working their regular shifts in a single, fully-operational physical location. This fact, standing alone, should end any inquiry into mail ballot issues. The best "opportunity to vote" and the best chance to "maximize participation" is a manual election held at the Company's facility. None of the external political, global health or other generalized concerns to which the Regional Director alludes have any weight under Board precedent because, properly interpreted, the Board's focus should be on the exercise of employee choice.

B. A "Change In Circumstances" Analysis Does Not Justify Revocation Under Board Precedent.

In recent cases, the Board has seemingly permitted a regional director to revoke a stipulated election agreement based on COVID-19. *NorthShore Home and Hospice Services*, 13-RC-257168 (Apr. 23, 2020) (denying review relating to a revocation order that referred to "COVID-19" and stating, "In denying review of that Order, we rely on *Super Valu Stores, Inc.*, 179 NLRB 469, 469 (1969) ("Implicit in the Regional Director's authority to approve consent election agreements is his authority to revoke that approval when he determines that changed circumstances, discovered prior to the counting of ballots, warrant such revocation.")).[5] The Company respectfully submits that a "change in circumstances" analysis cannot excuse the Regional Director's actions in this matter.

No Board precedent stands for the proposition that a mere "change in external circumstances" justifies the revocation of a stipulated election agreement fully capable of

[5] The Company notes that *NorthShore Home & Hospice Services* involves very different facts than this matter—specifically, a not-for-profit providing home and hospice care. The Company's facility, by contrast, is an essential operation whose workforce has been uninterrupted by COVID-19 issues. The Company also submits, for reasons previously stated, that the "ripeness" issue present in *NorthShore* does not exist here.

performance. Instead, the "change in circumstances" found to justify revocation in NLRB case law has consistently related to issues of employee participation or representation (*i.e.*, unit issues). *See, e.g., Super Valu Stores, Inc.*, 170 NLRB 469, 469 (1969) (stipulation properly set aside where second union sought to intervene as employee representative); *Oroply Corp.*, 121 NLRB 1067, 1068 (1958) (precedent relied upon by *Super Valu* wherein a second union filed a second representation petition shortly after approval of the stipulation, thereby creating a "unit issue which could be resolved only by a determination of the Board."); *American-Republican, Inc*., 171 NLRB 43 (1968) (approval of revocation where second union filed second petition); *Riviera Mines Co*., 108 NLRB 112, 113 (1954) (revocation of approval justified by substantial and previously unknown increase in workforce that threatened to "disenfranchise a substantial number of employees"); *N. Am. Plastics Corp*., 326 NLRB 835 (1998) (revocation justified by employer reneging on commitment to permit alleged discriminatees to vote on premises). Under established Board precedent, a regional director's authority to revoke a stipulation capable of performance must be based upon employee choice factors (intervening/second union, disenfranchisement, etc.).

No such "changed circumstances" exist here. All eligible voters have been and remain working safely at the Company's facility. Maximization of the franchise is accomplished only through a manual election. *See, e.g., Western Wall Systems, LLC,* 28-RC-247464 (April 16, 2020) at fn. 1 ("[T]his is yet another case that reveals the many potential problems inherent in mail ballot elections. The Board is therefore open to addressing the criteria for mail balloting in a future appropriate proceeding.") For all of these reasons, the Regional Director's actions violate Board precedent.

Additionally, all of the considerations surrounding a "change in circumstances" analysis support the Company's position in this case. First, and obviously, issues surrounding COVID-19 were known at the time the Regional Director approved the Agreement. Second, whatever COVID-19 developments may have occurred in the interim, they have not impacted the voting unit or their workplace in any fashion that would render a manual vote inappropriate, much less impossible as required by *T&L Leasing*. Third, and finally, the voters reside in Texas—a state that will be at least "partially re-opened" by the time any election takes place.[6]

Put simply, if it is safe for the residents of Texas (including resident Board personnel) to attend movies in theaters, eat within restaurants and shop in a mall—then it is likewise safe to conduct a brief, manual election in a facility adhering to COVID-19 safeguards well in excess of these other businesses.

C. The Regional Director Should Have Assessed the Safety of the Company's Facility, Which Operates in Excess of CDC Guidelines.

The *Employer's Response to Order to Show Cause* fully details the numerous and effective safety protocols that have been in place throughout the COVID-19 situation. (*See* Attachment 3 at pp. 3-4.) While the Company will not restate all of these safeguards, a few merit special consideration.

- Unlike the grocery stores or other "essential" facilities that most of the population (including, presumably, Board personnel) have visited during the pandemic, the facility has IR thermometers on site for screening; 100% screening is in place; and no one is permitted to leave their vehicle until a scan is successfully passed.

[6] The Company and the Union each endorse a May 14, 2020 manual election. (*See* Attachment 5.)

- The facility itself and the voting room are massive in scope and sufficient to maintain recommended six (6) foot social distancing and, in fact, can accommodate even greater distances if necessary.
- The voting room is adjacent to a large outdoor area that can be used for election purposes.
- The Company has procured a separate voting table with approximately 180 individual, disposable writing instruments. *Compare Victory Wine* at p. 4 (finding, without basis, that a manual election requires that every voter must necessarily use a single, shared writing instrument).

Put simply, the Company's facility operates in accordance with and in substantial excess of all pertinent safety guidelines. The facility houses a set workforce, and is not open to the general public. The facility, quite obviously, is abundantly safer than the average grocery store, liquor store or other "essential establishments" which have been frequented notwithstanding COVID-19 issues.

D. The Amended Order Violates Current Board Election Jurisprudence.

The Board reactivated election proceedings in an April 17, 2020 announcement entitled "COVID-19 Operational Status," stating, "Consistent with their traditional authority, Regional Directors have discretion as to when, where and if an election can be conducted, ***in accordance with NLRB precedent***." (Emphasis added). The Regional Director's actions in this matter simply cannot be said, under any reasoned analysis, to "accord" with existing precedent. For that reason, if the Board intends to stand by its original announcement, it must grant this request for review of the Regional Director's actions. This is so because the Regional Director's actions are

based on nothing more ***than the mere existence of COVID-19 issues***—completely divorced from precedent, the parties' desires and the undisputed facts of this matter.

In response to a plethora of factors supporting a manual election in this case, the *Amended Order* relies on a conclusory premise: "COVID-19 exists and no manual election will be held so long as it does." To justify this posture, the Regional Director (and others) must ignore or, worse yet, misapply clear Board precedent and to exercise unfettered discretion. In the heat of the moment and absent any apparent direction from the Board, regional directors have resorted to some extraordinary analysis.

Regional directors have relied on "junk science." *See, e.g., Victory Wine* at p. 5, n. 9 (relying on a "terribly misleading" theory (per Dr. Anthony Fauci) about "turbulent puff clouds"—a theory so misleading, in fact, that Dr. Fauci had to demonstrate its folly with the live demonstration embedded in this cite: https://nypost.com/2020/03/31/dr-fauci-research-showing-coronavirus-can-travel-27-ft-is-misleading/).

They have re-fashioned fundamental standards of proof in a manner more appropriate to a McCarthy-era hearing. *See, e.g., Citizen 360 Condo*., 02-RC-257691 (Reg'l Dir. Apr. 17, 2020) ("The Employer's representative was unable to proffer any evidence that each eligible voter, observer, party representative, ***and each member of their respective households***, has not tested positive for COVID-19" [Emphasis added.]).

They have dismissed out-of-hand commonsense safety suggestions with misplaced political commentary or sheer scientific ignorance. *See, e.g., Victory Wine* at p. 5 (rejecting the use of masks and gloves because, "Those supplies are most needed by healthcare institutions at this time," despite the fact that the location at issue (Texas) has a surplus of medical supplies and there was no showing that the employer "stole" or "misappropriated" gloves/masks from a

hospital); *see also ibid*. (finding, "Regarding sanitation and disinfecting of the voting place, these measures would do little to substantially reduce the potential for spread," even though soap and water, bleach, ethanol, surface wipes, *etc.* all have proven nearly 100 percent effective in killing the virus (https://www.sciencealert.com/here-s-the-expert-advice-on-which-cleaning-products-to-use-against-coronavirus)).

They have indulged unsupported presumptions, no matter how preposterous, to advance their preferred switch to a highly problematic mail ballot procedure. *Victory Wine* at p. 5 (hypothesizing/finding that an observer may not recognize his co-worker due to a mask, such that the mask may have to be removed to identify the voter, and further hypothesizing/finding that a split second of mask removal for identification purposes will "result in potential cross-contamination"). When the clear safety shortcomings related to a mail ballot are raised, however, they dismiss such concerns as frivolous. *See, e.g., Flynn Architectural Finishes, Decision and Direction of Election*, 05-RC-258064 (Reg'l Dir. Apr. 22, 2020) (finding a voter's approaching the cardboard ballot box to deposit a ballot constitutes a clear and present danger and could result in repeated touchings of the box—even though contact isn't necessary to insert a ballot—but a concern that voters may not open mail due to COVID-19 "seems highly unlikely and/or speculative").

Regardless of the facts of the specific case before them or the wishes of the parties involved—and notwithstanding the Board's directive that they should exercise their discretion to determine "when, where and if an election can be conducted, in accordance with NLRB precedent"—regional directors seem to arrive at the same conclusion: Manual elections should not be held so long as COVID-19 exists in the world.

If it is the Board's position that only mail ballot elections are currently viable, then the Company respectfully submits that the Board should simply say so. The Company respectfully submits, however, that the Board should not pretend that such a pronouncement adheres to applicable Board precedent.

VI. CONCLUSION

The Regional Director in this case has not, and cannot, justify the *Amended Order* under established Board precedent. Simply typing "COVID-19," without any assessment or explanation regarding the pertinent location and actual situation of a facility and its workforce, does not justify a material breach of the Agreement or establish a change in circumstances sufficient to warrant revocation. The Board should return its focus to employee participation and free choice considerations, rather than allowing regional directors to indulge in other speculation and analysis well outside the NLRB's purpose and authority. A denial of this Request under these undisputed facts, put bluntly, is akin to a prohibition on manual elections for the foreseeable future.

For all of these reasons, the Company respectfully requests that the Board grant review, vacate the *Amended Order* and reinstate the parties' Agreement with the amendments agreed upon by the Company and the Union regarding the revised election date, time and place. (*See* Attachment 5.)

Dated this 29th day of April 2020.

Respectfully submitted,

/s/ Jeremy Moritz

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42685805.1

ATTACHMENT 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

JOHNSON CONTROLS, INC.

Employer

and **Case 16-RC-256972**

SMART - SOUTHWEST GULF COAST REGIONAL COUNCIL

Petitioner

ORDER TO SHOW CAUSE

On March 4, 2020,[1] I approved a stipulated election agreement in this matter ("the Agreement"). The Agreement waived the parties' right to a hearing and contained various stipulations by the parties including, inter alia, that the Employer met the Board's standard for jurisdiction, the Petitioner is a labor organization, that the bargaining unit set forth in the Agreement was appropriate for the purposes of collective bargaining, and that other employees would be permitted to vote subject to challenge. The Agreement also provided that the election would be conducted manually on March 26. The Agreement included a provision that "if the election is postponed, the Regional Director, in his or her discretion, may reschedule the date, time and place of the election."

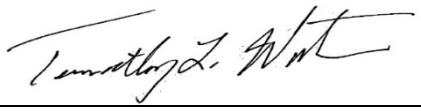
On March 17, the parties were notified that the March 26 election was being postponed due to public health and safety concerns and the Board subsequently announced it was suspending all elections until at least April 3.[2] On April 1, the Board announced that it would resume conducting representation elections on April 6 provided the Regional Director concluded in each case that an election could be conducted safely for both participants and Board personnel.

ACCORDINGLY, IT IS HEREBY ORDERED that the parties submit a written statement as to whether: (1) a manual election can be conducted safely and if so, the procedures that would be undertaken to ensure a safe election; (2) I should invoke the provision in the Agreement authorizing Regional Directors to reschedule a cancelled election and issue a new Notice of Election providing for a mail ballot; or (3) I should revoke my approval of the Agreement and issue a Notice of Hearing if the parties are unable to reach agreement on the timing and manner in which the election should be held.[3] The written statements are due on **April 16, 2020**, and

[1] All dates hereinafter are in 2020 unless otherwise indicated.
[2] https://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-suspends-representation-elections-through (last accessed March 19, 2020).
[3] *T&L Leasing*, 318 NLRB 324 (1995) fn 12.

should be filed electronically (E-Filed) through the Agency's website, www.nlrb.gov and should include a showing that the statements were duly served on all other parties.

DATED at Fort Worth, Texas, this 9th day of April 2020.



TIMOTHY L. WATSON
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 16
819 TAYLOR STREET, ROOM 8A24
FORT WORTH, TX 76102-6107

ATTACHMENT 2

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- Fellow - The American Bar Foundation

April 9, 2020

Timothy Watson, Regional Director
National Labor Relations Board, Region 16
819 Taylor St, RM 8A24
Fort Worth TX 76102-6107

RE: Johnson Controls, Inc.
16-RC-256972

Dear Director Watson:

In response to your Show Cause Order, dated, April 9, 2020, in the above-referenced matter, Petitioner respectfully requests the election be conducted by mail ballots, pursuant to the previously approved election agreement.

Should you have any questions, feel free to contact me. Thank you for your consideration and cooperation.

Very truly yours,

Patrick M. Flynn

Patrick M. Flynn

PMF/sw

cc: jeremy.moritz@ogletreedeakins.com

ATTACHMENT 3

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

JOHNSON CONTROLS, INC.,

Employer

and **Case 16-RC-256972**

SMART- SOUTHWEST GULF COAST REGIONAL COUNCIL,

Petitioner

EMPLOYER'S RESPONSE TO ORDER TO SHOW CAUSE

Election agreements are "contracts" binding upon the parties that executed them. *See, e.g.*, *Barcelona Shoe Corp.*, 171 NLRB 1333, 1343 (1968). For this reason, the actions contemplated by the *Order to Show Cause*, if acted upon, would constitute a material breach by the Regional Director. *T&L Leasing*, 318 NLRB 324, 326 (1995).[1]

I. Background.

On February 26, 2020, SMART-Southwest Gulf Coast Regional Council ("Petitioner") filed a representation petition involving a Johnson Controls, Inc. ("the Employer" or "the Company") facility located in San Antonio, Texas. Following prolonged and detailed negotiations, the Regional Director for National Labor Relations Board ("the Board") Region 16 approved a Stipulated Election Agreement ("the Agreement") on March 4, 2020. The Agreement established

[1] The *T&L Leasing* decision holds that the Regional Director is bound by the terms of a Stipulation "in the absence of unusual circumstances making the agreement **impossible** to perform." *Id.* at 326. The current coronavirus circumstances are unusual, but they do not render a manual ballot election "impossible to perform." In fact, the circumstances created by the coronavirus today are not materially different from those existing at the time the Regional Director approved the Stipulation Election Agreement on March 4, 2020.

a March 26, 2020 manual election at the Company's facility, specifically in the break room. ***At the time of the stipulation, COVID-19 issues were already well-publicized and known.*** (*See e.g.,* Monitoring of Persons Exposed to Patients Confirmed COVID-19 - United States, January - February 2020 (Mar. 3, 2020 early release),[2] Hearing on an Emerging Disease: How the U.S. is Responding to COVID-19, the Novel Coronavirus (Mar. 3, 2020)[3]; CDC Confirms First US Case of Wuhan Coronavirus (Jan, 21, 2020).[4]

On March 17, 2020, the Board postponed the representation election due to public health and safety concerns. On April 1, 2020, the Board announced that it would resume conducting representation elections insofar as health/safety concerns allow.

II. The Order to Show Cause.

On April 9, 2020, the Regional Director for Region 16 issued an *Order to Show Cause*. The *Order* seeks a statement from the Employer as to whether:

> (1) a manual election can be conducted safely and, if so, the procedures that would be undertaken to ensure a safe election;
>
> (2) [the Regional Director] should invoke the provision in the Agreement authorizing Regional Directors to reschedule a cancelled election and issue a new Notice of Election providing for mail ballot; or
>
> (3) [the Regional Director] should revoke approval of the Agreement and issue a Notice of Hearing if the parties are unable to reach an agreement on the timing and manner in which the election should be held.

As to the first question, a safe election ***remains fully viable*** in accordance with the parties' existing

[2] https://www.cdc.gov/mmwr/ volumes/69/wr/mm6909e1.htm?s_cid=mm6909e1_w
[3]https://www.fda.gov/news-events/congressional-testimony/hearing-emerging-disease-threat-how-us-responding-covid-19-novel-coronavirus-03032020)
[4]https://www.contagionlive.com/news/persontoperson-transmission-confirmed-in-novel-coronavirus-outbreak); *see also* the CDC's Publications for all early publications of the virus: https://www.cdc.gov/coronavirus/2019-ncov/communication/publications.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fpublications.html).

contractual obligations under the Agreement. The second question involves actions ***outside the Regional Director's discretion and authority***. Finally, the third question contemplates an unjustified delay in resolving a question concerning representation and ***invites chaotic results***.

For all of these reasons, the Company respectfully requests that the Regional Director establish a new election date no earlier than fourteen (14) days from the Regional Director's resolution of the *Order to Show Cause*. The Company additionally submits that the election should proceed in a fashion consistent with the Agreement to the extent possible. At minimum, the election should be a manual election in accordance with established Board precedent.

III. The Status of the Petitioned-for Facility.

The relevant facility produces industrial chillers at 5680 FM 1346, San Antonio, Texas 78220. Industrial chillers are essential to a variety of buildings, including those housing health care personnel and equipment. At all times, the facility operates in a safe manner. At all material times, the facility's workforce and operations have remained uninterrupted by any COVID-19 issue.

The facility has continued its operations as an "essential" function under the definitions established by the Governor of Texas, Bexar County Judge Nelson W. Wolff and any and all other relevant federal, state and local authorities. The plant functions in full accordance with ***and in excess of*** all Center for Disease Control ("CDC") guidelines. All of the following precautions (and others) have been in place due to current circumstances:

* Increased employee-wide communications regarding health/safety protocols;
* Additional cleaning resources and enhanced cleaning schedule to ensure sanitation;
* Additional cleaning supplies and sanitizers across the facility;
* Time clocks repeatedly treated with antiviral spray;
* Staggered and revised break and lunch periods to maintain social distancing;
* Seating areas revised to maintain social distancing;
* Physical markings on floors to maintain proper social distancing;
* Open doors to ensure additional ventilation and sunlight;

* Limitations on outside smoking areas and required social distancing;
* Mandatory adherence to handwashing protocols with antibacterial gel backup;
* Provision and mandatory use of face masks;
* Increased frequency of Local Emergency Management Team sessions;
* Non-essential employees (*not eligible voters*) work from home where appropriate; and
* IR thermometers on site for screening; 100% scanning in place; no one permitted to leave vehicle until scan successfully passed.

Consistent with these mitigation efforts, the Company's San Antonio facility has ***no reported, confirmed or even rumored cases of COVID-19 infection or work-related exposure***. Put simply, the facility and its personnel practice the Company's highest safety protocols to ensure safety and well-being.

IV. Additional Manual Election Protocols at the Board's Disposal.

With respect to the conduct of the manual election, a myriad of commonsense additional protocols are available. Upon the Board's request (although the Company respectfully requests five (5) business days' advance notice), the Company will implement any or all of the following additional protections for voting purposes.

1. A voting table including a Plexiglas screen(s) between the NLRB Agent/Election Observers and those approaching the table to vote.
2. A separate table with a spread of approximately 180 individual, disposable pens or pencils (the voting unit consists of approximately 150 employees).
3. Floor markings to ensure proper social distancing for the voting line and within the voting room.[5] The Company estimates that the area immediately outside the voting room can sustain a line of approximately twenty-five (25) voters consistent with proper social distancing.

[5] The break room serving as the voting area is approximately 2,052 square feet, and can safely accommodate voters while maintaining CDC guidelines.

4. The Employer will provide masks for the Board Agent, Union personnel and Election Observers.

5. While gloves are not mandatory for employees, the Company will make gloves available for the Board Agent and Election Observers.

6. The voting room stands immediately adjacent to an outdoor area. If requested, the Company can construct a "tailgate tent" (four legs, no sides but covered on top) adjacent to the voting room as an outdoor voting booth area.

The Board also has multiple self-help options available for a manual election. For instance, the Board could use multiple voting booths separated by proper distance. The Board could provide a "backup" voting booth for use in the event the original booth is rendered less than optimal. Finally, and while the Company believes the Agreement's voting times are more than adequate for a manual election under these circumstances, the current voting period could be extended by the Regional Director given the election's postponement.

Significantly, by the time the new election date is set, lesser or no COVID-19 restrictions may be in place for San Antonio, Texas. According to Judge Nelson W. Wolff's April 6, 2020, Executive Order, the stay at home measures end April 30, 2020 at 11:59p.m. Thus, assuming the manual ballot election is scheduled after May 1, 2020, there could be no restrictions in place in San Antonio, Texas. (*See also*, Governor Abbott's plans to "slowly, strategically, smartly, and safely" reopen private businesses: https://news.yahoo.com/texas-gov-wants-slowly-reopen-210500882.html.)

APPLICABLE LEGAL STANDARDS

The *Order to Show Cause* sets forth three (3) options with respect to the pending election: (1) abide by the Agreement and proceed with a manual election; (2) the Regional Director's unilateral and improper amendment of the Agreement to provide for a mail ballot election; and (3) a unilateral revocation of the Agreement followed by a Notice of Hearing. Only the first option stands as viable.

The Company's facility is and has been safely operational with a full complement of eligible voters. All CDC, local and other guidelines are in place. As stated above, ***no reported, confirmed or even suspected cases of COVID-19 exist at the Employer's San Antonio facility***. The facility is a massive manufacturing facility with ample open/extra space, proper ventilation and lighting. The voting room and its immediate vicinity likewise are substantial in scope and more than adequate to sustain approximately 150 voters with due regard to proper social distancing. In sum, there is simply no basis for the election to proceed as anything other than a manual election directly supervised by NLRB personnel. *See San Diego Gas & Electric*, 325 NLRB 1143 (1998) (the NLRB's longstanding rule is that elections should generally be conducted manually).

The other actions contemplated by the *Order to Show Cause* violate established Board precedent, common sense, or both. The *Order* suggests the Regional Director may "invoke the provision in the Agreement authorizing regional directors to reschedule a cancelled election and issue a Notice of Election providing for mail ballot." The Agreement's reference to "reschedule[ing] the date, time and place of the election" ***is not synonymous*** with imposing a different method of election. *T&L Leasing, supra*. Put simply, the Regional Director lacks the authority to take the action described in the *Order to Show Cause*.

The *Order to Show Cause's* final option centers on revoking approval of the Agreement followed by a Notice of Hearing. The *Order's* suggestion constitutes a classic case of a cure being worse than the original disease. The Regional Director has not (and cannot) establish the "impossibility" of a manual election where 150 voters are working without incident or interruption. *T&L Leasing*, 318 NLRB at 325, n. 12 (regional director may not materially alter agreed-upon terms absent a showing of ***"impossibility***") (emphasis added). Furthermore, even if the Regional Director could satisfy the "impossibility" standard, the *Order's* presumption is misplaced. The Regional Director must revoke/breach ***all of the Agreement, or none of the Agreement***. Thus, there is no reason to indulge the *Order's* presumption of a hearing limited to disputes over "the timing and manner in which the election should be held." Furthermore, the Company respectfully submits that the Board has yet to grapple with the full panoply of subpoena, witness fees, document production, credibility resolution and related issues that would surround any hearing attempted under the current circumstances.

I. A Manual Election is "Preferable," "Possible" and, Therefore, Must Proceed.

As a threshold matter, a mail ballot election would not be proper under the current circumstances ***even in the absence of the Agreement***. The Board's preferred method of election is a manual vote supervised by Board personnel. *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Mail or "mixed" ballot voting only exists when necessary to "***enhance the opportunity of all to vote.***" *NLRB Casehandling Manual*, Part 2, Section 11301.2 (January, 2017). Here, all of the approximately 150 eligible voters are working their regular shifts in a single, fully-operational physical location. This fact, standing alone, should end any inquiry or dalliance into mail ballot issues. The best "opportunity to vote" clearly involves a manual, supervised election at the voters' place of employment.

Nonetheless, the Order suggests that current COVID-19 factors somehow undermine longstanding Board precedent and preferences. This suggestion fails because the Board's proper focus belongs ***only*** on issues surrounding voter participation. For this reason, unfettered discretion is not simply handed to regional directors simply because a national emergency, natural disaster or similar situation exists. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) ("A regional director's discretion, however, is not unfettered and is to be exercised within certain guidelines."). Instead, those instances must directly relate to voter participation.

Thus, in *San Diego Gas & Electric*, the Board referred to "extraordinary circumstances" that may increase regional director discretion. 325 NLRB at 1145. Those "circumstances," however, ***must directly relate*** to the issue of voter participation. *Id.* at 1144 (the "extraordinary circumstances" must "make it difficult to vote in a manual election" and mail ballot ***only permissible*** where it would "enhance the opportunity for all to vote.") (emphasis added). For this reason, previous circumstances akin to the current environment did not result in an "entitlement" to a mail ballot but, rather, a necessary delay to proceed with the Board's preferred manual ballot format. *See Kanuai Coconut Beach Resort*, 317 NLRB No. 145 (1973) (election deferred until after hurricane); *A&B Hvac Servs., Inc*., No. JD (NY)-44 13, 2013 WL 5305832, at *1 (Sept. 19, 2013) (election postponed due to after effects of Hurricane Sandy).

The Board's role is to ensure maximum voter participation and does not extend to any of the other political, health or other issues surrounding COVID-19. Here, every eligible voter is present and working at the Employer's facility. A manual election at this facility obviously provides the best option for voter participation. Nothing more is required, and nothing else properly matters insofar as the Board's role is concerned.

Second, and more fundamentally, the Agreement in place is a "contract" binding upon the

parties that executed it. *See, e.g., Barcelona Shoe Corp.*, 171 NLRB at 1343. Any alteration or revocation of the Agreement would amount to a material breach by the Regional Director. *T&L Leasing, supra*. The Regional Director is bound by the terms of the Agreement absent "unusual circumstances making the agreement ***impossible*** to perform." *Id.* at 326 (emphasis added). The Regional Director clearly cannot meet this standard.

At the risk of belaboring the obvious, 150 eligible voters have found a way to report to work without interruption, notwithstanding COVID-19 issues. Clearly, it is likewise "possible" for a Board Agent to conduct a ***single day*** manual vote on site. The San Antonio facility has ***no COVID-19 cases*** and operates under ***established protocols that meet and exceed*** all CDC and related guidance. The facility houses a set group of team members and is not open to the public. Put simply, the Employer's facility undoubtedly constitutes a far safer environment than the average supermarket, liquor store or other "essential" place of business that the average person (and, no doubt, most Board agents) have visited throughout the pandemic.

Finally, the Board's own actions strongly suggest that manual elections remain fully viable despite COVID-19 issues. The Board's April 1, 2020, announcement states: "[T]he General Counsel now has advised that appropriate measures are available to permit elections to resume in a safe and effective manner, which will be determined by the Regional Directors." News Release, NLRB Office of Public Affairs, https:www.nlrb.gov/news-outreach/news-story/nlrb-Resumes Representation Elections, (April 1, 2020). Had the Board intended to adopt a "mail ballot only" approach, it surely would have said so.

A manual, on-site election is clearly "possible" under the Agreement. For this reason, the election must proceed under the terms established by the Agreement.

II. The Regional Director Lacks the Authority Alluded to in the Order to Show Cause.

The *Order to Show Cause* asks whether the Regional Director "should invoke the provision in the Agreement authorizing Regional Directors to reschedule a cancelled election and issue a new Notice of Election providing for mail ballot." The Regional Director has no authority to take this action under Board precedent.

In T*&L Leasing*, the parties entered into a stipulated election agreement following discussions of a manual election at the site of a third party (Sears, Roebuck & Co.). 318 NLRB at 324, n. 3. Sears refused to permit an election at its facility, prompting the employer to suggest a "motel conference room within walking distance from the Sears facility." *Id*. at 324. The regional director refused the employer's alternative offer and ordered a mail ballot election. *Id*. The Board deemed the regional director's actions a "material breach" and set the election aside.

Just as significantly, *T&L Leasing* forecloses the action suggested by the *Order to Show Cause*. The Agreement states, "If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time and place of the election." The *Order*, without any explanation or basis, attempts to read into this phrase Regional Director discretion ***over the method*** (manual, mail ballot, mixed) of the election.

As *T&L Leasing* makes clear, however, "date, time and place" is not synonymous with the method of an election.

> Further, the provisions of the Stipulation relating to the election time and place were at all times capable of performance. Thus, even when the original polling place proved unavailable, the Regional Director was authorized under the plain language of the Stipulation ***to designate another location for balloting***. . . . Instead of choosing a site suggested by the Employer or designating an alternative site however, the Regional Director ***ordered a mail ballot election***, over the Employer's objection.

318 NLRB at 326 (emphasis added). Whatever authority the Regional Director may have under

the Agreement here, that authority obviously does not extend to unilateral changes as to election method.

For all of these reasons, the Order's "second option" falls well outside of the Regional Director's authority.

III. The Regional Director Lacks the Necessary Prerequisite for "Revocation" of the Agreement and, Regardless, Issuing a "Notice of Hearing" Invites Chaos.

The "third option" laid out by the *Order to Show Cause* queries whether the Regional Director "should revoke [his] approval of the Agreement and issue a Notice of Hearing if the parties are unable to reach agreement on the timing and manner in which the election should be held." The *Order* incorrectly presumes the Regional Director can satisfy the prerequisite for "revocation." Moreover, the Order wrongly assumes that any hearing would be limited to "timing and manner" of the election.

As noted above, the Regional Director must satisfy an "impossibility" standard before revoking the current agreement. *T&L Leasing*, 318 NLRB at 326, n. 12 ("[W]e find this 'impossibility of performance' standard is implicit from Board and court cases holding that where there is an approved stipulation, neither the parties nor the Board may breach its material terms. Obviously, however, ***where material agreed-upon terms are impossible to perform, regional directors may set aside the stipulation***." (emphasis added)). There is simply no basis for a claim of "impossibility" here and, therefore, revocation of the Agreement would be inappropriate.[6] Indeed, ***nearly any manual election*** held by the Board nationwide would undermine any

[6] Generally speaking, Texas does not constitute a "hot spot" insofar as COVID-19 is concerned. As of this writing, the San Antonio area likewise had fewer than 1,000 confirmed cases of the virus—significant numbers of which centered on sites such as prisons, nursing homes and similar "group housing-type" facilities. "Coronavirus Live Updates: A Timeline of Covid-19 in San Antonio," *San Antonio Express-News* (April 15, 2020 5:05 p.m. CST).

"impossibility" claim, particularly if the election occurs in an area more infected than the San Antonio area. Nearly ***any showing*** that any Board personnel occupied a grocery store or other "essential" site similarly would destroy any claims of "impossibility."

Finally, the Order incorrectly assumes that any "Notice of Hearing" would be limited to matters concerning the "timing and manner" of the election. A revocation of the Agreement or a switch to mail ballot constitutes a material breach. *T&L Leasing,* 318 NLRB at 325. A material breach renders an entire "contract," not just a portion, null and void upon request of the aggrieved party. *See generally*, Restatement (Second) of Contracts (1981). For this reason, the *Order* is wrong to presume that issues concerning, for instance, the eligibility of newly-hired employees, other employee groups or personnel would somehow be "off limits" in any subsequent hearing.

In addition, the Employer seriously questions the Board's current wherewithal to conduct representation hearings "remotely" or in accordance with current restrictions. Board rules and regulations surrounding subpoenas, witness fees, document production, witness credibility resolution and the like do not seem easily adaptable to the current situation. Consequently, a myriad of due process concerns would surround "going back to square one" through issuance of a new Notice of Hearing.

IV. Revocation of the Agreement or Switching to "Mail Ballot," Standing Alone, Would Constitute Objectionable Conduct.

The *Order to Show Cause*, and certain actions suggested by it, ignores certain inescapable realities. The *Order* questions whether "a manual election can be conducted safely" at a facility that has remained operational at all pertinent times because the federal, state and local authorities have deemed the facility and its workforce "essential." The *Order* further alludes to an unauthorized (as discussed above) unilateral "cancellation" of the scheduled manual election and a change to a mail ballot procedure. Finally, the *Order* contemplates simply "reopening" all issues

surrounding the original February 26, 2020, representation petition—a petition that will likely age a minimum of at least two (2) full months before a single voter casts a single vote. The *Order* seems unaware that all of its inquiries and, indeed, the *Order* itself constitute political actions in the current environment.

The Petition involves a group of essential employees who have remained at work notwithstanding various "stay at home" or "shelter in place" edicts. As essential employees, the Company's team members are required to work (both by the Company and due to the decisions of various governmental entities) while a substantial portion of the population sits at home. They are not collecting unemployment, let alone "supplemental" $600 unemployment payments. Presumably, they maintain a similar schedule to that which they maintained before the outbreak of COVID-19. They are not in a position to "binge watch" the virus away, sit on the couch and drink beer or "sleep in" for as long as they want. The voting employees (and their managers) are working per usual with an unresolved question concerning representation hanging over their workplace.

As one might expect, the "coronavirus has become the election campaign." Key issues now include the Company's responsiveness to the pandemic, "hazard pay," the rationale for some workers being labeled "essential" while others are not, and whether it is "safe to come to work" in the first instance. Against this backdrop, the *Order* contemplates certain government actions that unquestionably would undermine (if not destroy) the laboratory conditions necessary to a fair election.

"The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be

interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside an election." *Athbro Precision Eng'g Corp*., 166 NLRB 966, 966 (1967). The Board's conduct and the appearance of neutrality is particularly critical where it bears upon a "local issue in the campaign before the election." *NLRB v. Slate Plating & Finishing Co.*, 738 F.2d 733, 739 (6th Cir. 1984). Where a Board action appears to "endorse the union's position on a local issue of great concern to [employees]," a certification or bargaining order cannot withstand scrutiny. *Id*. at 740. Elections do not occur in a vacuum separated from government action.

Here, the *Order* contemplates switching from an already agreed-upon manual election to a mail ballot procedure without any explanation or justification whatsoever beyond a generalized "concern." Imposing a mail ballot election under these circumstances, in and of itself, would destroy the appearance of Board neutrality and the laboratory conditions necessary to fair election.

Any switch to a mail ballot election would send an unmistakable and incurable political message. The Board's implicit imprimatur would attach to all of the following:

> Are you concerned about reporting to work during the pandemic? Well, the Board agrees. In fact, the Board would not permit one of its agents to spend even a half day at your workplace to conduct a brief election spanning less than four (4) hours.
>
> Do you think you should receive "hazard pay?" You bet you should. Even a fully trained "government agent" was not brave enough to work where you work.
>
> Do you think the Company's response to the COVID-19 situation is sufficient? Don't be so sure, the government's actions suggest otherwise.
>
> Think it is fair that you have to work while your neighbor sits safe at home? It's not fair and you know who agrees? The National Labor Relations Board and its agents.

This, of course, is merely a brief preview of the political fallout associated with certain actions suggested by the *Order*.

CONCLUSION

The parties (including the Regional Director) entered into a binding contract that calls for a manual election. It is not "impossible" to hold the election as agreed and, in fact, the undersigned fully plans to attend that election. The Company's facility is as safe as possible given the current circumstances and, indeed, far safer than the typical supermarket, liquor store or other "essential business" open to the general public.

For all of these reasons, the Regional Director should issue a Notice of Election consistent with the parties' Agreement. The election should take place on a Thursday to ensure the highest employee participation, as discussed in the negotiations leading up to the Agreement. Finally, all parties should receive at least fourteen (14) days' notice of any impending representation election, and the Company should have five (5) business days to comply with any additional safety precautions requested for the voting area.

Dated: April 16, 2020

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

s/ Jeremy C. Moritz
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Attorneys for Johnson Controls, Inc.

CERTIFICATE OF SERVICE

I certify that on April 16, 2020, a copy of the foregoing ***EMPLOYER'S REPONSE TO ORDER TO SHOW CAUSE*** was Electronically Filed as a .pdf document via the NLRB's e-filing system and transmitted via email and U.S. First-Class Mail to:

Timothy L. Watson
Regional Director - Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6107
By E-Filing

B. Kenyon
Regional Council
SMART - Southwest Gulf Coast
7551 Callaghan Road, Suite 320
Email: bkenyon@smart-swgcrc.org

Patrick M. Flynn, Attorney
Patrick M. Flynn, PC
1225 N Loop W., Ste 1000
Houston, TX 77008-1775
Email: pat@pmfpc.com

s/ Jeremy C Moritz

ATTACHMENT 4

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

JOHNSON CONTROLS, INC.

Employer

and **Case 16-RC-256972**

SMART - SOUTHWEST GULF COAST REGIONAL COUNCIL

Petitioner

AMENDED ORDER REVOKING STIPULATED ELECTION AGREEMENT AND NOTICE RESCHEDULING REPRESENTATION HEARING

On March 4, 2020,[1] the Regional Director approved a Stipulated Election Agreement in which the parties agreed that a Board-conducted manual election be held in this case at the Employer's San Antonio, Texas, facility on March 26. On March 17, the Region postponed the March 26 election due to public health and safety concerns related to the COVID-19 pandemic in the United States. In light of this situation, including the resumption of Board elections, on April 9, the Region issued an Order to Show Cause seeking the positions of the parties on whether a manual election could be conducted safely, whether a Notice of Election scheduling a mail ballot election should issue; or whether the Stipulated Election Agreement should be revoked and the parties proceed to a hearing.

The parties submitted their responses, wherein the Petitioner requested that the election take place by mail ballot and the Employer advocated that a manual election be conducted.

Having considered the parties' positions, I find that, under the current circumstances involving the COVID-19 pandemic, I must revoke my approval of the March 4 Stipulated Election Agreement in order to ensure the safety of all parties, Board personnel, voting employees, and the general public.

Accordingly, I **HEREBY REVOKE** my approval of the Stipulated Election Agreement. A Hearing is therefore required in order to further process the petition in this case and, as a result,

It is further **ORDERED** that a Hearing in this case be rescheduled to **May 1, 2020, at 9:00 a.m.** by telephone or videoconference. The hearing will continue on consecutive days thereafter until concluded. At the hearing, the parties will have the right to appear and give testimony. The telephonic or videoconference hearing details will be provided to the parties by **April 28, 2020**.

YOUR ARE NOTIFIED pursuant to Section 102.63(b) of the Board's Rules and Regulations, JOHNSON CONTROLS, INC. must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such

[1] All dates hereinafter are in 2020 unless otherwise indicated.

that is received by them by no later than **noon** Central time on **April 30, 2020.** The Statement of Position may be E-Filed but, unlike other E-Filed documents, must be filed by noon Central on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

You are further **NOTIFIED** that the hearing officer will hold a pre-hearing conference to discuss the possibility of the parties reaching a stipulated election agreement; potential technical difficulties which may be faced by participants in hearing, such as internet accessibility; the advance submission of exhibits; the presentation of witnesses; rules of conduct for hearing attendees; and, if necessary, subpoenaed documents, petitions to revoke, or other pre-hearing motions.

DATED at Fort Worth, Texas, this 23rd day of April, 2020.

Timothy L. Watson
Regional Director
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6107

ATTACHMENT 5

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

JOHNSON CONTROLS, INC.,

Employer

Case 16-CA-256972

and

SMART- SOUTHWEST GULF COAST REGIONAL COUNCIL,

Petitioner

JOINT MOTION TO PROCEED WITH MANUAL ELECTION

This *Joint Motion to Proceed with Manual Election* is made by Petitioner SMART-Southwest Gulf Coast Regional ("the Union") (through its attorney, Patrick M. Flynn) and the Employer Johnson Controls, Inc. ("the Company") (through its attorney, Jeremy C. Moritz). In support of this Motion, the parties respectfully submit the following:

BASIS FOR MOTION

1. On March 4, 2020, the Regional Director for the National Labor Relations Board ("the Board"), Region 16 approved a Stipulated Election Agreement ("the Agreement") establishing a manual election that was to have occurred on March 26, 2020. The election was postponed due to a March 17, 2020 Board Order.

2. On April 9, 2020, the Regional Director for Region 16 issued an *Order to Show Cause* concerning the method of election. In response, the Union requested a mail ballot procedure. The Company, by contrast, advocated for a manual election consistent with the Agreement.

3. Based on these positions (at least in part), the Regional Director revoked his approval of the Agreement on April 23, 2020. The Regional Director further set a hearing for May 1, 2020 regarding election matters.

4. The Union has reconsidered its position regarding the election. While the Union is not opposed to a mail ballot procedure, the Union submits that the safety and other assurances contained in the *Employer's Response to Order to Show Cause* are ***sufficient to permit a manual election to go forward***. The Company's position remains as stated in its *Response*.

REQUESTS FOR MANUAL ELECTION TO PROCEED

Based on the foregoing, the parties request that the Regional Director reinstate the Agreement and proceed with the election as stipulated. *See, e.g., T&L Leasing*, 318 NLRB 324, 325 (1995)(election agreements are not to be set aside absent showing of impossibility); *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998)(desire of parties central to election method issue and, further, regional director may not consider internal Board concerns absent "scattered" voters or strike/lockout/picketing). The parties further request that the Regional Director amend the Agreement to reflect the following adjustments (strike-throughs and highlighted language reflect changes to Agreement's original language).

4. **ELECTION.** A secret-ballot election under the Board's Rules and Regulations shall be held under the supervision of the Regional Director on the date and at the hours and places specified below.

Date: ~~March 26, 2020~~ ***Thursday, May 14, 2020***

Hours: ~~1:30 p.m. 5:00 p.m.~~ ***12:30 p.m.- 5:30 p.m.***

Place: Main Lunch Room in White Building, at the employer's facility located at 5692 FM 1346, San Antonio, Texas 78220 ***and outdoor area immediately adjacent to Lunch Room.***

Finally, given the parties' agreement as to the election date, hours, place and method, and the absence of a dispute as to any other matters relating to the election, the parties respectfully request that the Regional Director cancel the hearing currently scheduled for May 1, 2020.

Dated: April 24, 2020

Respectfully submitted,

Patrick M. Flynn, P.C.

s/ Patrick M. Flynn

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Ogletree, Deakins, Nash, Smoak & Stewart

s/ *Jeremy C. Moritz*

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JOHNSON CONTROLS, INC.,

Employer,

and **Case No. 16-RC-256972**

SMART- SOUTHWEST GULF COAST REGIONAL COUNCIL,

Petitioner.

JOHNSON CONTROLS, INC.'S REQUEST FOR REVIEW OF

REGIONAL DIRECTOR'S DENIAL OF JOINT MOTION

Respectfully submitted,

/s/ Jeremy Moritz

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Counsel for Johnson Controls, Inc.

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, Johnson Controls, Inc. (the "Company") requests review of the Regional Director for Region 16's denial of the *Joint Motion to Proceed with Manual Election* ("*Joint Motion*") filed by the Company and Smart-Southwest Gulf Coast Regional Council ("the Union").[1] (*See* Attachments 1 and 2.) The following compelling reasons require the Board to grant this Request:

- A substantial question of law exists because the denial of the *Joint Motion* presents a departure from officially reported Board precedent. *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998).
- A substantial question of law or policy is raised because the denial of the *Joint Motion* can only be based upon an implicit finding of "extraordinary circumstances" related to COVID-19 concerns. *Assuming arguendo* that the Regional Director properly deemed COVID-19 an extraordinary circumstance warranting revocation of the parties' stipulated election agreement ("Agreement") under *San Diego Gas* (*i.e.*, a circumstance akin to where job duties are scattered over a wide geographic area, where voters are not present at a common location during a common time, or where a strike/lockout exists), the Regional Director was required to consider "the desire of all parties." Both the Company and the Union here seek a manual ballot election consistent with the parties' original Agreement.

[1] A separate, more detailed Request for Review of the Regional Director's Amended Order is being filed simultaneously with this submission. The other Request centers around the propriety of the Regional Director's revocation of the parties' stipulated election agreement. The other Request sets forth the full procedural history of this matter, which is equally applicable to this filing. In the interest of brevity, that full history is not again included in this filing—which specifically focuses solely on the Regional Director's denial of the *Joint Motion to Proceed with Manual Election*.

The Regional Director's "overruling" of the Agreement can only be based upon internal Board concerns and/or the Regional Director's personal preferences. Those concerns, as a matter of public policy and Board precedent, cannot override the desires of the Company and the Union with respect to the agreed-upon method of election. *See San Diego Gas* at 1145, n. 8 (mail ballots should not be ordered based solely on budgetary or other internal Board concerns).

The Regional Director does not (and, should not) have unlimited discretion to overrule the determination and agreement of an employer and a union that a manual election can be safely conducted. Nor is there any basis for a finding that the Regional Director is somehow more qualified to evaluate "safety" than the parties themselves. The Regional Director's denial of the parties' *Joint Motion* undermines, rather than advances, the right of employees to participate in a Board-supervised election, and the public interest in maximum voter turnout and opportunity to participate.

CONCLUSION

The Board should grant this *Request for Review of the Regional Director's Denial of Joint Motion,* grant the parties' *Joint Motion to Proceed with Manual Election,* and direct an election according to the original Stipulated Election Agreement as modified by the parties' *Joint Motion* with respect to the date, time and place changes necessitated by the Board's temporary pause of representation proceedings.

Alternatively, the Board should require a rationale from the Regional Director well beyond generalized concerns to the effect of, "but, but, COVID-19"—or bare assertions to the effect of, "after consideration, *Joint Motion* denied." It is respectfully submitted that the Company, the Union and eligible voters deserve better.

Dated this 29th day of April 2020.

Respectfully submitted,

/s/ Jeremy Moritz
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Counsel for Johnson Controls, Inc.

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ATTACHMENT 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

JOHNSON CONTROLS, INC.,

Employer

Case 16-CA-256972

and

SMART- SOUTHWEST GULF COAST REGIONAL COUNCIL,

Petitioner

JOINT MOTION TO PROCEED WITH MANUAL ELECTION

This *Joint Motion to Proceed with Manual Election* is made by Petitioner SMART-Southwest Gulf Coast Regional ("the Union") (through its attorney, Patrick M. Flynn) and the Employer Johnson Controls, Inc. ("the Company") (through its attorney, Jeremy C. Moritz). In support of this Motion, the parties respectfully submit the following:

BASIS FOR MOTION

1. On March 4, 2020, the Regional Director for the National Labor Relations Board ("the Board"), Region 16 approved a Stipulated Election Agreement ("the Agreement") establishing a manual election that was to have occurred on March 26, 2020. The election was postponed due to a March 17, 2020 Board Order.

2. On April 9, 2020, the Regional Director for Region 16 issued an *Order to Show Cause* concerning the method of election. In response, the Union requested a mail ballot procedure. The Company, by contrast, advocated for a manual election consistent with the Agreement.

3. Based on these positions (at least in part), the Regional Director revoked his approval of the Agreement on April 23, 2020. The Regional Director further set a hearing for May 1, 2020 regarding election matters.

4. The Union has reconsidered its position regarding the election. While the Union is not opposed to a mail ballot procedure, the Union submits that the safety and other assurances contained in the *Employer's Response to Order to Show Cause* are ***sufficient to permit a manual election to go forward***. The Company's position remains as stated in its *Response*.

REQUESTS FOR MANUAL ELECTION TO PROCEED

Based on the foregoing, the parties request that the Regional Director reinstate the Agreement and proceed with the election as stipulated. *See, e.g., T&L Leasing*, 318 NLRB 324, 325 (1995)(election agreements are not to be set aside absent showing of impossibility); *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998)(desire of parties central to election method issue and, further, regional director may not consider internal Board concerns absent "scattered" voters or strike/lockout/picketing). The parties further request that the Regional Director amend the Agreement to reflect the following adjustments (strike-throughs and highlighted language reflect changes to Agreement's original language).

4. **ELECTION.** A secret-ballot election under the Board's Rules and Regulations shall be held under the supervision of the Regional Director on the date and at the hours and places specified below.

Date: ~~March 26, 2020~~ ***Thursday, May 14, 2020***

Hours: ~~1:30 p.m. 5:00 p.m.~~ ***12:30 p.m.- 5:30 p.m.***

Place: Main Lunch Room in White Building, at the employer's facility located at 5692 FM 1346, San Antonio, Texas 78220 ***and outdoor area immediately adjacent to Lunch Room.***

Finally, given the parties' agreement as to the election date, hours, place and method, and the absence of a dispute as to any other matters relating to the election, the parties respectfully request that the Regional Director cancel the hearing currently scheduled for May 1, 2020.

Dated: April 24, 2020

Respectfully submitted,

Patrick M. Flynn, P.C.

s/ Patrick M. Flynn

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s/ *Jeremy C. Moritz*

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ATTACHMENT 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

JOHNSON CONTROLS, INC.

Employer

and **Case 16-RC-256972**

SMART - SOUTHWEST GULF COAST REGIONAL COUNCIL

Petitioner

ORDER DENYING JOINT MOTION TO PROCEED WITH MANUAL ELECTION

On April 24, 2020, the Employer and the Petitioner filed a Joint Motion to proceed with a manual election in this case. After consideration, the Motion is hereby denied.

DATED at Fort Worth, Texas, this 28th day of April 2020.

Timothy L. Watson
Regional Director
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6107

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JOHNSON CONTROLS, INC.,

Employer,

and **Case No. 16-RC-256972**

SMART- SOUTHWEST GULF COAST REGIONAL COUNCIL,

Petitioner.

JOHNSON CONTROLS, INC.'S

REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S ORDER

Respectfully submitted,

/s/ Jeremy Moritz
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Counsel for Johnson Controls, Inc.

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, Johnson Controls, Inc. (the "Company") requests review of the Regional Director for Region 16's *Order to Postpone Hearing* dated April 23, 2020 ("*Order*"), setting a representation case hearing to be conducted "telephonically or by video" commencing at **9:00 AM Central Time on Monday, May 4, 2020**. (*See* Attachment 1.)

The following compelling reasons require the National Labor Relations Board ("NLRB" or "Board") to grant this Request:

- A substantial question of law or policy is raised because the *Order* presents a departure from officially reported Board precedent, to the extent it requires the parties to participate in a telephonic or videoconference representation case hearing.
- To the extent the *Order* rests on valid interpretations of existing Board precedent, there are compelling reasons for reconsideration with respect to important Board rules and policy.

In support of its Request, the Company adopts in its entirety the relevant rationale and argument set forth in the *Employer's Motion Objecting to Telephonic Representation Hearing* dated April 27, 2020 in *Morrison Healthcare*, 12-RC-257857, which the Company submits applies equally to the instant case. (*See* Attachment 2.)

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CONCLUSION

For all of these reasons, the Company respectfully requests that the Board grant this *Request for Review of the Regional Director's Order,* vacate the *Order*, and stay the hearing that is currently set to commence on Monday, May 4, 2020 at 9:00 AM Central Time.

Dated this 1st day of May 2020.

Respectfully submitted,

/s/ Jeremy Moritz
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Counsel for Johnson Controls, Inc.

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ATTACHMENT 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

JOHNSON CONTROLS, INC. **Employer** **and** **SMART – SOUTHWEST GULF COAST REGIONAL COUNCIL** **Petitioner**	**Case 16-RC-256972**

ORDER TO POSTPONE HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from May 1, 2020, at 9:00 AM to 9:00 AM on **Monday, May 4, 2020**, and on consecutive days thereafter until concluded, a hearing will be conducted **telephonically or by video**[1] before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

The Statement of Position in this matter must be filed with the Regional Director and served on the parties listed on the petition by no later than **noon Central time on May 1, 2020.** The Statement of Position may be e-Filed but, unlike other e-Filed documents, must be filed by noon Central time on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: April 30, 2020

TIMOTHY L. WATSON
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 16
819 Taylor St Rm 8A24
Fort Worth, TX 76102-6107

[1] Details will be provided at a later date.

ATTACHMENT 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWELVE

MORRISON HEALTHCARE,	:	
Employer,	:	
-and-	:	
	:	**Case No. 12-RC-257857**
SEIU UNITED HEALTHCARE WORKERS EAST	:	
Petitioner.	:	

EMPLOYER'S MOTION OBJECTING TO TELEPHONIC REPRESENTATION HEARING

JACKSON LEWIS, P.C.
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Counsel: **Thomas V. Walsh**
Christopher M. Repole

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWELVE

MORRISON HEALTHCARE,	:	
Employer,	:	
-and-	:	
	:	**Case No. 12-RC-257857**
SEIU UNITED HEALTHCARE WORKERS EAST	:	
Petitioner.	:	

EMPLOYER'S MOTION OBJECTING TO TELEPHONIC REPRESENTATION HEARING

Morrison Healthcare ("the Employer"), for the reasons stated below, objects to holding a hearing in the above-captioned matter via telephone. Further, the Employer moves that the hearing be conducted in person at the offices of Region Twelve (or another agreed-upon single location) on a date and time to be determined.

I. A Representation Case Hearing Held by Telephone Is Not Consistent with the Rules and Regulations of the National Labor Relations Board.

On March 11, 2020, the Regional Director wrote to the Employer, forwarding a Notice of Representation Hearing, as prescribed by the Rules and Regulations of the National Labor Relations Board ("Rules"). The Notice of Representation Hearing, consistent with Board Rules and the National Labor Relations Act ("the Act"), scheduled the hearing in this case to be held at the Region's office in Miami. However, on April 22, 2020, the Regional Director issued a new Notice, directing that the hearing in this matter be conducted not at the offices of Region Twelve, not in person, and not even by Skype or other "video" format, but by telephone.

Nothing in the Act, the Board's Rules, nor any procedural manual supports conducting a representation case hearing in which none of the participants are present in a single room, let alone a situation where they do not even have the opportunity to observe each other. The absence of any support for this unprecedented procedure is not surprising. The very concept of a hearing conducted entirely by telephone is utterly alien to the Act. This is underscored by Board rule §102.64(b) which states that hearings shall be open to the public – a de facto impossibility in a hearing conducted through a pre-arranged telephonic invitation.

II. The Board Has Consistently Restricted the Use of Remote Participation in Hearings.

On occasion, the Board has considered allowing remote participation in hearings (i.e., not in-person), but approval has been sparingly granted, and for good reason. Furthermore, while the Board may allow video proceedings in certain circumstances, it does not appear to have permitted telephonic proceedings. The issue usually arises in the context of video hearings in an unfair labor practice proceeding. In MPE, Inc., 09-CA-084228 and 09-CA-084595 (January 29, 2015), the Board agreed with the Administrative Law Judge who rejected the use of a proposed mode of video testimony."[1] The Board's rationale for restricting remote video testimony was summarized well by Administrative Law Judge Mara-Louise Anzalone in Columbia Sussex Corp.:

> ... Section 102.35(c) of the Board's Rules & Regulations (based on Fed. R. Civ. P. 43) indicates a *strong preference for in-person testimony* and provides that video testimony may be permitted only where the requesting party demonstrates good cause based on compelling circumstances. See Section 102.35(c); see also Fed. R. Civ. P. 43, 1996 Advisory Committee Notes ([t]he very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. "*The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition*").

[1] However, in MPE, Inc., the Board granted the General Counsel's motion, allowing a single witness who was incarcerated in a federal prison to electronically testify utilizing a different technology used by the Bureau of Prisons and subject to the safeguards inherent in that environment.

Columbia Sussex Corp., 19-CA-215741 (ALJ Order, Feb. 15, 2019) (emphasis added). Likewise, in Oncor Electric Delivery Co., 364 NLRB No. 58 (July 29, 2016), the Board upheld an administrative law judge's decision to permit remote video testimony of one witness at trial. The judge said:

> Clearly, the general principle is that *testimony should be live*, so that the judge and counsels are in the best position to observe the witness. However, exceptions can be warranted. Thus, Federal Rule of Civil Procedure 43(a) provides that "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." ... "*Safeguards must be adopted to ensure accurate identification of the witness and the protection against influence by persons present with the witness.*"

Oncor, slip op. at 8 (emphasis added). Judge Sandron found the circumstances of that witness' testimony satisfied those safeguards: the witness was not an alleged discriminatee, not a direct witness to any events alleged in the complaint and was limited to background evidence regarding workplace technology necessary to understanding the facts of the case. Moreover, the witness testified from a NLRB regional office, and *a Board agent was present throughout*. Id.

In sum, the Board has permitted remote participation by specific individuals in a limited number of cases, and at that, where there are robust protections and precautions safeguarding the integrity of the hearing. Virtually none of those protections will be present for the telephonic hearing contemplated in this matter. While the Employer in no way concedes that a video format would be permissible under Board law and practice or otherwise appropriate, conducting a purported official hearing by teleconference is totally at odds with basic due process and fairness concepts and otherwise should not be permitted.

III. The Multiplicity of Locations Poses Practical Barriers to a Fair Hearing.

The fact that the Hearing Officer, court reporter, an uncertain number of party representatives and counsel, and potentially other unseen participants would each join remotely – from separate locations – exponentially multiply the practical and due process issues inherent in a telephonic hearing. In addition, the scattering of participants means there will be *no* control over the locations from which each telephonic participant is speaking. The potential for undue influence or other interference at each location will be – and cannot be – checked. The safeguards noted by Judge Sandron in Oncor – to ensure accurate identification of participants and the protection against influence by those present with participants – will not only not exist, but the risks will be multiplied.

IV. Conclusion.

For the foregoing reasons, a hearing conducted by telephone falls far short of minimal standards for a full, open, and fair hearing. The current COVID-19 crisis does not justify trampling basic procedural due process and other rights in the name of convenience or expediency. The Regional Director should cancel the telephone call and reschedule an in-person hearing for the soonest date possible.

Respectfully Submitted,

By: /s/ Christopher M. Repole
Thomas V. Walsh
Christopher M. Repole

ATTORNEYS FOR MORRISON HEALTHCARE

Dated: April 27, 2020
New York, New York

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWELVE

MORRISON HEALTHCARE,	:	
Employer,	:	
-and-	:	
	:	**Case No. 12-RC-257857**
SEIU UNITED HEALTHCARE WORKERS EAST	:	
Petitioner.	:	

CERTIFICATE OF SERVICE

A copy of the Employer's foregoing motion was electronically served this day on:

Union representative Christella Dorval
2881 Corporate Way
Miramar, FL 33025
(served via e-mail, at christella.dorval@1199.org)

Regional Director David Cohen
National Labor Relations Board, Region 12
201 E Kennedy Blvd Ste 530
Tampa, FL 33602-5824
(served via e-filing)

/s/ Christopher M. Repole
Christopher M. Repole

Dated: April 27, 2020

ATTACHMENT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

San Antonio, Texas

JOHNSON CONTROLS, INC.

Employer

and **Case 16-RC-256972**

SMART – SOUTHWEST GULF COAST REGIONAL COUNCIL

Petitioner

DECISION AND DIRECTION OF ELECTION

On February 26, 2020,[1] SMART – Southwest Gulf Coast Regional Council ("Petitioner") filed a representation petition under Section 9(c) of the Act seeking to represent certain employees of Johnson Controls, Inc. ("Employer").

On March 4, I approved a stipulated election agreement for a manual election to take place on March 26, however, on March 17, I issued an Order Postponing Election because of safety concerns related to the COVID-19 pandemic in the United States. Two days later, on March 19, the National Labor Relations Board ("Board") ordered all Board-conducted elections temporarily suspended. The Board lifted its suspension and resumed conducting elections on April 6. In ending the suspension, the Board noted appropriate measures for conducting elections in a safe and effective manner were available and the determination as to such measures would be left to the Regional Directors.

Because mail ballots have the advantage of significantly reducing social interactions, after the Board lifted the suspension of Board elections, the Region solicited the parties' positions as to the appropriateness of a mail-ballot election. Thereafter, the parties submitted their positions. The Employer opposed holding the election by mail, asserting a manual election could be conducted safely at its facility, while the Petitioner advocated for a mail-ballot election.

On April 23, after considering the parties' positions, I revoked the stipulated election agreement and scheduled a hearing for the parties to present evidence and witnesses regarding the appropriate unit and their positions on the method of election. The next day, April 24, the Employer and Petitioner filed a joint motion to proceed with a manual election, proposing an agreed-to date, time, and place for the election, which I denied.

[1] All dates are in 2020 unless otherwise noted.

On May 4, a hearing officer of the Board held a telephonic hearing in this matter.[2] The parties stipulated to an appropriate bargaining unit[3] and presented offers of proof on the method of election.

I. DECISION

Based on the parties' stipulations at hearing, having reviewed the parties' positions, and having considered other factors, as addressed below, I have determined that because of the extraordinary circumstances presented by the ongoing pandemic, the Board will conduct this election by mail-ballot.

Although the type of election to be held is not a litigable issue at a hearing,[4] I herein provide the basis for my decision to order a mail-ballot election in this case.

National, state, county, and local authorities have all declared states of emergency or disaster, and public health officials recommend minimizing in-person contact. I am unconvinced by the Employer's position that measures could be undertaken which would allow for the safe and effective conducting of a manual ballot election at this time. The most responsible measure to ensure a safe election is to change the method to a mail-ballot election, which will minimize the risk of exposing employees, Board agents, Employer and Union representatives, their families, and the public to this virus and, thereby, maximize participation. Additionally, given the current rapidity of changes to both recommended and mandatory virus countermeasures, a manual ballot election would be fraught with uncertainty and subject to unpredictable changes. A mail-ballot election provides the certainty of process and procedure to conduct an election within a reasonably prompt period and in an effective manner.

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[2] The Employer argued it was not appropriate to proceed with the hearing because it had submitted a Request for Review with the Board on the preceding business day, however, requests for review do not operate to stay a hearing unless specifically ordered by the Board, which did not happen in this case. See Section 102.67(c) of the Board's Rules and Regulations.

[3] There are approximately 149 employees in the stipulated unit, however, the parties could not agree on the inclusion or exclusion of hourly plant clericals employees (including quality control, engineering, maintenance, production, and warehouse). According to the record, there are about 7 plant clericals. Because the Employer raises eligibility issues affecting at most approximately 5 percent of the unit, I conclude the Employer's contentions do not significantly change the size or character of the unit and thus are not relevant to a question concerning representation. Consequently, the parties were not permitted to present evidence at the hearing, as I concluded that it was unnecessary to resolve the eligibility issues before the election is conducted. Consistent with Section 102.64 of the Board's Rules and Regulations, I direct that the individuals in those classifications may vote in the election and that their ballots shall be challenged since their eligibility has not been resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

[4] See, for example, *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc*., 108 NLRB 1366 (1954).

II. BACKGROUND AND POSITIONS OF THE PARTIES

The Employer is a Wisconsin corporation engaged in diverse industrial and technological endeavors. At its facility in San Antonio, Texas, the workplace at issue in the instant petition, the Employer designs and produces heating, ventilation and air conditioning (HVAC) systems, industrial refrigeration, building management systems, fire and security systems, and mechanical equipment for commercial and residential buildings.

Although the Petitioner initially advocated for a mail-ballot election, it subsequently asserted a manual election is the most appropriate method of election and, citing the Board's press releases, notes that such an election can be held at the discretion of Regional Directors. However, Petitioner argues that if the Regional Director does not deem a manual election safe in this case, it should not cause further delay and, per the Board's Rules and Regulations, this case involves extraordinary circumstances warranting a mail-ballot election.

The Employer does not reject the contention that the present pandemic requires special considerations, but it maintains that the risk can be mitigated, and that it is capable of taking steps which would ensure a safe manual election. In this regard, the Employer indicates it is able to provide a well-ventilated area, including an outdoor opening, that will allow room for social distancing; a plexiglass partition between the voters, the election observers, and the Board agents conducting the election; ample disposable pens or pencils for single-use voting; masks for the election observers, Union representatives, and Board agents; and gloves for the election observers and Board agents. The Employer stresses that there have been no confirmed, reported, or even suspected cases of COVID-19 at its San Antonio facility.

The Employer asserts only a manual election would be appropriate, arguing the Board's decision in *San Diego Gas & Electric*, 325 NLRB 1143 (1998) provides that representation elections should be held manually, and that mail balloting is only permissible where it enhances the opportunity for all to vote. The Employer contends there are no such circumstances here and that conducting a manual election while observing social distancing and other safety protocols at the Employer's facility is manageable. Further, it argues that under *San Diego Gas*, the rare exception to the manual election presumption has been where employees are widely scattered and cannot easily visit the workplace to vote, which is not the case here.

III. CONDUCTING A MANUAL BALLOT ELECTION WOULD RISK INFECTING EMPLOYEES, THE BOARD AGENTS CONDUCTING THE ELECTION, AS WELL AS JEOPARDIZING THE HEALTH OF THE PUBLIC AT LARGE

At the time of this decision, despite unprecedented efforts to limit transmission, over 72,000 deaths from COVID-19 have been reported in the United States, with over 1.2 million confirmed cases.[5] The voting group of employees, other personnel at the Employer's facility, National Labor Relations Board Region 16 personnel, and the general population of south-central

[5] Johns Hopkins University & Medicine *Coronavirus Resource Center* https://coronavirus.jhu.edu/map.html, (last accessed May 6, 2020).

Texas are subject to the risks of COVID-19 transmission. This risk has been recognized by officials in several declarations, recommendations, and orders at the national, state, and local level. President Donald J. Trump, issued a "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," on March 13.[6] That same day, Governor Greg Abbott, similarly issued a proclamation certifying that COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas.[7] On April 12 Governor Abbott issued Executive Order 18 extending his disaster declaration for all Texas counties in response to COVID-19.[8]

Texas has been significantly affected by the novel coronavirus, with new confirmed cases and deaths every day. On April 23, Texas had reported almost 22,000 cases of COVID-19, with 1,649 patients in the hospital because of the virus. By May 6, less than two weeks later, reported cases have increased more than 50% to over 34,000; there are now 1,812 patients in hospitals because of the virus; and statewide fatalities have increased from 561 to 948 people.[9] In Bexar County, where the Employer's facility is located, 1,677 cases have been confirmed and 52 people have died from COVID-19.[10]

Government agencies and authorities, recognizing the danger of this pandemic, have taken appropriate measures to limit exposure. Bexar County Judge Nelson Wolff has ordered all citizens to stay at home except for travel related to essential activities, and to observe social distancing and face covering requirements, and has prohibited all indoor and outdoor public or social gatherings of any number of people outside of a single household (unless specifically exempted by the order) until May 19.[11] On April 29, City of San Antonio Mayor Ron Nirenberg indefinitely extended his declaration of a local state of disaster and health emergency.[12] Federal courts in the Western District of Texas have postponed all trials scheduled through May 31.[13]

Although Region 16 has available personnel who would appear to be infection free, the virus is believed to spread through presymptomatic and asymptomatic individuals. At some point in the future, testing may be more widespread. Currently, sending a Board agent to conduct the election would risk the exposure of everyone at the facility. Eligible voters along with other employees who may come into contact with these participants, Board agents, and party representatives, would risk being exposed to the virus and spreading it to the community and their

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[6] https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/ (last accessed May 5, 2020).

[7] "Governor Abbott Declares State of Disaster In Texas Due To COVID-19," https://tdem.texas.gov/covid-19/#1584552291367-2b8805f2-7b68 (last accessed May 5, 2020). As of April 29, 2020, Governor Abbott has issued 20 executive orders related to COVID-19.

[8] "Governor Abbott Extends Disaster Declaration For COVID-19," https://gov.texas.gov/news/post/governor-abbott-extends-disaster-declaration-for-covid-19 (last accessed May 5, 2020).

[9] Texas Department of State Health Services, "Texas Case Counts: COVID-19 Case Dashboard," (last accessed May 6, 2020).

[10] Ibid.

[11] https://www.bexar.org/DocumentCenter/View/26838 (last accessed May 5, 2020).

[12] Mayor's Emergency Declaration No. 6. https://www.sanantonio.gov/Portals/0/Files/health/COVID19/Public%20Info/4.29%20Mayor's%20Emergency%20Declaration%20No.%206.pdf?ver=2020-04-29-173056-153 (last accessed May 5, 2020).

[13] See https://www.txwd.uscourts.gov/coronavirus-covid-19-guidance/.

families. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote.

The Board's manual election procedures require close proximity for the duration of the election between Board agents, election observers, and voters. Even if single-use disposable pens or pencils are used, Board agents hand fresh ballots to eligible voters and voting takes place in an enclosed booth before the marked ballot is placed in a sealed box; each ballot is individually handled by the Board agent conducting the election and available for inspection by the party representatives. Before voting, voters are required to give their names to party observers, who then check the name off the same voter list. These procedures carry the risk of exposure for employees at the facility, party representatives, Board personnel, their families, and the community.

IV. THE ONLY ACCEPTABLE WAY TO MITIGATE THESE RISKS IS A MAIL-BALLOT ELECTION

In its position statement, the Employer contends the following measures can ensure a safe and effective manual election: using social distancing measures by making sure voters are not less than six feet apart at any given time and maintaining a sanitary and disinfected place for all on the premises. While the Employer offered to provide floor markings at more than the appropriate distance, there are no means for enforcing social distancing. I have also considered the feasibility and efficacy of its other proffered measures. Regarding the election itself, I have considered using masks and gloves, frequently sanitizing election equipment, and the use of plastic barriers. I have also considered the required testing of participants (regardless of symptoms) and whether a Board agent conducting the election could observe appropriate restrictions while traveling to the election site.

Additionally, as discussed, I have considered using a mail-ballot election and measures associated with a mail-ballot election. I have considered requiring Region 16 personnel to sanitize outgoing mail, limiting the number of people who may participate in the count; and requiring social distancing for count attendees.

Regarding the Employer's proposed social distancing in the voting area, I agree social distancing could reduce the risk of spread; however, I note the experts disagree about the distance required for safety and that guidelines are subject to change. Current Center for Disease Control guidance defines "good social distance" as "about 6 feet."[14] Some scientists disagree that 6 feet is enough.[15] Given the uncertainty of determining an "appropriate" distance, we cannot be sure current guidelines sufficiently mitigate risk. Additionally, it is possible guidelines could change between the time of an election order and the date of the election.

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[14] See the Center for Disease Control website entry: Coronavirus Disease 2019 (COVID-19), Prevent Getting Sick, How COVID-19 Spreads. https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last accessed May 5, 2020).

[15] See, for example, Lydia Bourouiba, "Turbulent Gas Clouds and Respiratory Pathogen Emissions Potential Implications for Reducing Transmission of COVID-19," Journal of American Medicine, March 26, 2020 ("Given the turbulent puff cloud dynamic model, recommendations for separations of 3 to 6 feet (1-2 m) may underestimate the distance, timescale, and persistence over which the cloud and its pathogenic payload travel, thus generating an underappreciated potential exposure range for a health care worker").

Regarding the use of masks and gloves, the Regional Office currently has none available. These supplies are most needed by healthcare institutions at this time. Although the Employer has offered to make such personal protective equipment available, the safest method would involve Board agents bringing their own equipment. I also note the role of the observer would be made more difficult if voters were wearing masks covering their faces and obscuring their identity. Removal of the masks by the voter during voting would result in potential cross-contamination, thereby rendering the process even more risky.

Regarding sanitation and disinfecting of the voting place, these measures would do little to substantially reduce the potential for spread, given the number of individuals coming in and out of the voting area, the need for the passing of papers and proximity of individuals for the purpose of providing ballots and checking off names.

Based on the foregoing, I conclude the use of a mail-ballot election would provide the framework for more certain election procedures.

V. DISCUSSION

Although the Employer is considered an essential business during this time, the health of its employees and their families must be protected. The Employer highlights that no confirmed, reported, or suspected cases of COVID-19 have occurred at the facility, however, even as new outbreaks occur around the state,[16] testing in Texas has lagged significantly behind the rest of the nation.[17] In Bexar County, fewer than 20,000 people out of more than 2 million have been tested.[18] Given that many—if not the majority—of people infected with (and capable of spreading) the novel coronavirus display no symptoms,[19] this low rate of testing and likely greater than reported rate of infection[20] is particularly worrisome. Moreover, given the necessary attendance of offsite participants such as Board agents and parties' representative at a manual election, not to mention offsite contacts by employees with unknown parties in the days and hours preceding the election, a manual election has a high potential for contributing to the spread of infection. Given the conditions in Texas at this time, and the available risk mitigation measures, I conclude that conducting an election placing employees in close proximity to Board agents and party observers, who may be traveling from areas with higher rates of infection than Bexar County—and who may unknowingly be carrying the virus—is not acceptable.

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[16] Christopher Collins and Sophie Novack, "COVID-19 Cases Now Tied to Meat Plants in Rural Texas Counties Wracked with Coronavirus," *Tex. Observer*, April 22, 2020.

[17] Asher Price, "As Abbott looks to reopen Texas, coronavirus testing lags most other states," *Statesman*, April 20, 2020

[18] City of San Antonio Metropolitan Health District, Novel Coronavirus (COVID-19) Public Info, accessed April 27, 2020 (19,245 tests administered in Bexar County to date).

[19] Monica Gandhi, Deborah S. Yokoe, and Diane V. Havlir, "Editorial: Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control Covid-19," *New Eng. J. Med.*, April 24, 2020 ("Asymptomatic transmission of SARS-CoV-2 is the Achilles' heel of Covid-19 pandemic control through the public health strategies we have currently deployed.")

[20] Kathleen M. Jagodnik et al., "Correcting under-reported COVID-19 case numbers: estimating the true scale of the pandemic," MedRxiv preprint, posted April 5, 2020 ("This study suggests that the current reporting of COVID-19 cases significantly underestimates the true scale of the pandemic. The lack of testing complicates the estimation of the true CFR and causes significant misinformation.")

The Employer contends that delay has never been a reason cited by the Board for ordering a mail-ballot election and argues the Board has delayed manual elections rather than use mail balloting. However, the Employer points to scant authority to support this contention.

In its Response to Order to Show Cause, the Employer primarily cites to *A&B HVAC Services, Inc.*, JD(NY)-44-13 (2013) (2013 WL 5305832), and *Kanuai Coconut Beach Resort*, 317 NLRB 996 (1995) both of which are inapposite. Neither of these cases supports the Employer's contention, "previous circumstances akin to the current environment did not result in an 'entitlement' to a mail ballot but, rather, a necessary delay to proceed with the Board's preferred manual ballot format."

In *A&B HVAC* an administrative law judge issued a decision regarding whether certain unfair labor practice allegations had been committed, and if so, whether they affected the election results in an election that had already taken place. In a passing footnote, the administrative law judge noted the election, "was originally scheduled for November 1, but had been postponed due to the effects of Hurricane Sandy," until November 15, 2012. This cited case has no bearing on the case at hand. To begin with, an administrative law judge's decision is not binding precedent unless the Board has adopted it over a party's exception.[21] Even assuming that the Board had adopted the decision and its passing footnote, it still would have no bearing on this case as the footnote was merely providing factual background. While the footnote is not useful as a point of law, neither is it even useful as an historical anecdote. Importantly, there is no evidence that, in light of the "Superstorm," a mail-ballot election was an available, possible alternative. Given the devastation wrought by the superstorm, employees might have been scattered and residing in temporary or new houses, and regular Postal Service may have been interrupted. If anything, *A&B HVAC* stands for the proposition that on the eve of a massive hurricane, a Board office closed, canceled an election, and then rescheduled it for a new date two weeks later. That proposition does nothing to bolster Employer's contentions.

The other case the Employer relies on, *Kanuai Coconut*, 317 NLRB 996 (1995), is even less relevant. There were no election scheduling issues in that case. Rather, the only the issue present in that matter was whether the Employer's scheduling of a pay increase affected the election.

Although neither of the cases cited by the Employer address "circumstances akin to the current environment," there is Board precedent for using mail ballots in times of emergency to expedite resolving questions concerning representation. During World War II, the Board changed its default method of election for employees at sea from manual elections on docked ships to mail balloting at sea. It did so "in the interest of expediency." *Isbrandsten Steamship Co., Inc.*, 51 NLRB 883, 885 (1944). See also, *Ore Steamship Corp.*, 59 NLRB 1216, 1218 (1944) (specifically

[21] See, e.g., *Colorado Symphony Assoc*., 366 NLRB No. 122, slip op. at 1 fn. 3 (2018) and Sec. 13–200 of the NLRB's Bench Book ("In reviewing prior decisions to determine whether any of the ALJ's findings or analyses have precedential value, it is important to check… 1) which party or parties filed exceptions to the ALJ's decision (this is usually stated in the first paragraph of the Board's decision); 2) whether no exceptions were filed to any of the judge's findings or analyses (this is usually stated in a footnote in the Board's decision); 3) whether the Board did not pass on any of the judge's findings or analyses for some reason (this is also usually stated in a footnote); and 4) whether the Board affirmed any of the findings on different grounds than the ALJ.")

authorizing regional director discretion to use mail balloting for employees at sea). More recently, the Board has ordered mail-ballot elections because of circumstances that would temporarily prevent or delay a manual election for an indefinite time. *San Diego Gas* mentions such a condition—a strike—as one in which a mail-ballot election would be appropriate. Presumably, a manual election could have been held at some unknown time after the strike ended, however, the Board recognized this was at least one situation where an election delay would be grounds for mail balloting, rather than a manual election.

The Board has also upheld the use of mail-ballot elections during the off-season for seasonal employees.[22] Even though it would have been possible to delay an election and hold it manually later in the year, when seasonal employees were present at work, the Board found a mail-ballot election proper in these circumstances.

Here, a manual election cannot be held without endangering the health and safety of employees, party observers, Board agents, and the broader community. Since the Board has allowed mail-ballot elections to take place in situations where a manual election would be delayed because of strikes or the absence of seasonal workers, and the current pandemic presents extraordinary circumstances preventing a manual election under the facts presented in this case, a mail-ballot election is appropriate.

A Regional Director has broad authority over conducting representation elections;[23] however, the Board has provided guidelines for reasonably exercising this discretion when ordering a mail-ballot election. The Board's policy for when a Regional Director should order a mail-ballot election was described in *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998):[24]

> When deciding whether to conduct a mail-ballot election or a mixed manual-mail-ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress. If any of the foregoing situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources,

[22] See, for example, *Pennsylvania Interscholastic Athletic Assn.*, 365 NLRB No. 107 (2017); *Sitka Sound Seafoods*, 325 NLRB 685 (1998).

[23] The Board has long held that a Regional Director has broad discretion to decide issues of election conduct, so long as this discretion is not abused or exercised arbitrarily, capriciously, or unreasonably. This includes determining whether to conduct an election by mail, even if the Direction of Election did not provide for mail balloting. See, for example, *California Pacific Medical Center*, 357 NLRB 197, 198 (2011); *North American Plastics Corp.*, 326 NLRB 198 (1998); *E.I. Dupont du Nemours*, 79 NLRB 345, 346 (1948); *Postex Cotton Mills, Inc.*, 73 NLRB 673, 677 (1947); *Fedders Mfg. Co.*, 7 NLRB 817, 822 (1938).

[24] See also NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11301.2 (Jan. 2017); Outline of Law & Procedure in Representation Cases Sec. 22-110.

> because efficient and economic use of Board agents is reasonably a concern. We also recognize that there may be other relevant factors that the Regional Director may consider in making this decision, but we emphasize that, in the absence of extraordinary circumstances, we will normally expect the Regional Director to exercise his or her discretion within the guidelines set forth above.

Although there is a preference for conducting manual elections in ordinary circumstances, *San Diego Gas* allows a Regional Director to exercise discretion and order a mail-ballot election in extraordinary circumstances.[25] *San Diego Gas* did not claim to provide an exhaustive list of circumstances where mail-ballot elections would be allowed, but rather *at least* three cases where mail-ballot elections should normally be used.

The Board rejected limitations implied by outdated language in the Casehandling Manual suggesting mail-ballot elections were proper only if manual elections were "infeasible," as well as suggestions that a mail-ballot election should never be held where it would be possible to conduct an election manually. *Id*. at 1145, fn 6, 10.

The Board, in *San Diego Gas*, clarified the use of mail-ballot elections is not limited to three enumerated circumstances, but that "other relevant factors," especially in "extraordinary circumstances" may be considered by a Regional Director. The present circumstances, a worldwide pandemic in which more than 185,000 deaths have occurred, are extraordinary, and present many relevant factors suggesting that a mail-ballot election would be appropriate.

VI. CONCLUSION

This election must be held "on the earliest date practicable consistent with the Board's rules."[26] A manual election cannot be held safely at this time. There is no indication when a manual election could be safely held. Waiting until it would be safe to conduct a manual election would further delay this already-delayed election. However, a mail-ballot election would allow this election to be held safely and without further delay.

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[27]

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[25] In their joint motion to proceed with manual election, the parties state their desire is "central" to the election method issue; however, *San Diego Gas* clearly makes it one of several considerations. Importantly, the Board recognized a Regional Director may use other unspecified factors when extraordinary circumstances are present.

[26] NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11302.1.

[27] The Employer, Johnson Controls, Inc., a Wisconsin corporation with a facility located at 5692 FM 1346, San Antonio, Texas, the only facility involved in this matter, is engaged in the business of manufacturing HVAC chillers.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> **INCLUDED**: All hourly, direct & indirect, production, manufacturing, and maintenance employees (including leadmen, test stand, shipping, warehouse, painters, forklift operators, assemblers, welders, electricians, machinists, quality inspectors, insulators, tubefitters, and shipping clerks) employed by the Employer at its facility currently located at 5692 FM 1346, San Antonio, Texas.
>
> **EXCLUDED**: All other employees, office clericals, temporary agency employees, guards, and supervisors as defined in the Act.
>
> **OTHERS PERMITTED TO VOTE*:*** At this time, no decision has been made regarding whether plant clerical employees are included in, or excluded from, the bargaining unit, and individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by SMART – Southwest Gulf Coast Regional Council.

A. Election Details

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on May 18. Voters must return their mail ballots so that they will be received by close of business on June 8. The mail ballots will be counted on June 16 at 2:00 p.m. at a location to be determined, either in person or otherwise, after consultation with the parties, provided the count can be safely conducted on that date.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 16 office by no later than 4:45 p.m. on May 26, in order to arrange for another mail ballot kit to be sent to that employee.

During the past 12 months, a representative period, the Employer, in conducting its business operations, purchased and received at its San Antonio, Texas facility goods valued in excess of $50,000 directly from points located outside of the State of Texas.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **April 25**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are 1) employees who have quit or been discharged for cause since the designated payroll period; 2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and 3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals who will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the regional director and the parties by **May 11**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election, included in this Decision and Direction of Election, in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

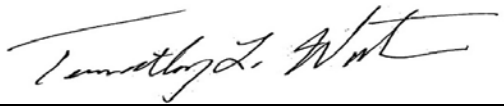
RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

DATED at Fort Worth, Texas, this 7th day of May 2020.



Timothy L. Watson, Regional Director
National Labor Relations Board, Region 16
Fritz G. Lanham Federal Building
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102-6107

ATTACHMENT C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MORRISON HEALTHCARE
Employer

and Case 12-RC-257857

SEIU UNITED HEALTHCARE WORKERS EAST
Petitioner

CORRECTED ORDER

Pursuant to Section 3(b) of the National Labor Relations Act and Section 102.67(c) of the Board's Rules and Regulations, and in order to more fully consider and address the issues raised in the Employer's Request for Review, we hereby stay the telephonic hearing scheduled for April 30, 2020, at 9:30 am, pending the Board's ruling on the Employer's Request for Review.[1]

JOHN F. RING, CHAIRMAN

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

Dated, Washington, D.C., April 30, 2020.

[1] We have treated the Employer's motion as a Request for Review.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BASF CORPORATION
Employer

and Case 07-RC-259428

INTERNATIONAL CHEMICAL WORKERS
UNION COUNCIL OF THE UNITED FOOD AND
COMMERICAL WORKERS INTERNATIONAL
UNION, AFL-CIO, CLC

ORDER

Pursuant to Section 3(b) of the National Labor Relations Act and Section 102.67(c) of the Board's Rules and Regulations, and in order to more fully consider and address the issues raised in the Employer's Request for Review, we hereby stay the Skype audio hearing scheduled for May 5, 2020, at 9:30 am, pending the Board's ruling on the Employer's Request for Review.

JOHN F. RING, CHAIRMAN

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

Dated, Washington, D.C., May 4, 2020.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JOHNSON CONTROLS, INC.,	)	
Employer,	)	
	)	
and	)	**Case No. 16-RC-256972**
	)	
SMART-SOUTHWEST GULF COAST	)	
REGIONAL COUNCIL,	)	
	)	
	)	
Petitioner.	)	

CERTIFICATE OF SERVICE

A copy of Johnson Control Inc.'s Request For Review Of Regional Director's Decision And Direction Of Election, Emergency Motion To Stay Mail Ballot Election, And Motion To Proceed With Manual Election was electronically served on the following parties:

Patrick Flynn
Attorney for the Petitioner
pat@pmfpc.com

Timothy L. Watson
Regional Director
NLRB - Region 16
Timothy.Watson@nlrb.gov

Respectfully submitted,

/s/ Jeremy Moritz
Jeremy C. Moritz, Esq.

Counsel for Johnson Controls, Inc.